NO: 83-1836

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

MELVIN M. BURTON, JR.
A Member of the Bar of the
District of Columbia Court of Appeals

PETITIONER,

VS

BOARD ON PROFESSIONAL RESPONSIBILITY OF
DISTRICT OF COLUMBIA COURT OF APPEALS

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Melvin M. Burton, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the District of Columbia Court of Appeals entered in the above entitled on January 11, 1984; petition for rehearing *en banc* denied on April 2, 1984.

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PARTIES

The parties to the proceedings in the District of Columbia Court of Appeals — the Court whose judgment is sought to be reviewed — were:

Melvin M. Burton, Jr.
a Member of the Bar of the
District of Columbia
Court of Appeals
(Petitioner herein)

and

Board on Professional Responsibility
of the District of Columbia
Court of Appeals
(Respondent herein)

QUESTIONS PRESENTED

1. Whether a newly defined definition for Disciplinary Rule 9-102 (A) (now renumbered 9-103 (A), can be applied to conduct occurring before the adoption of the new definition or whether this retroactive effect is therefore *Ex Post Facto* and violative of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

2. Where, under the newly adopted standard for Disciplinary Rule 9-102 (A), the prescribed sanction is that of disbarment, yet, the sanctions imposed thereunder ranged from suspensions to disbarment for similar conduct, has there been disparity in the imposition of sanctions which is violative of the due process requirement of the Fifth Amendment to the Constitution of the United States.

3. Has there been a violation of the Due Process requirement under the Fifth Amendment when the Board on Professional Responsibility is not estopped from using evidence of a prior adjudicated disciplinary proceeding to assist it in its determination in á new and unrelated proceedings.

4. Does the denial of the right for a Respondent to conduct a *voir dire* of hearing panel members, which right is granted pursuant to Disciplinary Rule, Chapter 8, Section 3 (1) c, violate due process and the Respondent's Fifth Amendment and Sixth Amendment Rights.

5. Does the Board of Professional Responsibility possess quasi-judicial authority, so as to empower it to conduct a hearing on the conduct of a Court Appointed Trustee, (The Respondent herein), where the Court has been to

consider referring the matter to the Board on Professional Responsibility, but does not do so.

6. Where the evidence presented against a Respondent is not clear and convincing but the Board on Professional Responsibility makes a finding that substantial evidence was present to support its finding, has the Board on Professional Responsibility afforded a Respondent the due process required in Disciplinary Proceedings.

7. In reviewing a disciplinary proceedings, does the Due Process Clause of the Fifth Amendment require the reviewing authorities (i.e., the Board on Professional Responsibility and the District of Columbia Court of Appeals) to utilize a standard to support their findings a test greater than the substantial evidence standard.

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OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals was reported on January 11, 1984 (D.C. App. 1984) and is printed in the Apendix "A"

The Order of the District of Columbia Court of Appeals denying the Petition of Respondent below for Rehearing *En Banc* was reported on April 2, 1984, and is printed in the Appendix.

The Reports and Recommendations of the Board of Professional Responsibility are printed in the Appendix.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered in January 11, 1984. A timely petition for Rehearing *En Banc* was filed on January 24, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS STATUTES AND RULES INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States; Section 11-2502, 13-701(c) and 23-107 D.C. Code (1973), portions of sections 4, of Rule XI of the Bar Rules of the District of Columbia Court of Appeals; All of the relevant provisions are set for the Appendix to this petition.

STATEMENT OF THE CASE

Section 11-2502 of the District of Columbia Code vests the District of Columbia Court of Appeals with jursidiction over attorney discipline. To assist it in performing this statutory assignment, the Court has established and delegated to a Board of Professional Responsibility the authority to hear complaints of attorney misconduct, to report its findings and conclusions to the Court, and to make appropriate recommendations in connection therewith.[1] The Board in carrying out its Responsibility pursuant to its authority appoints hearing committees to conduct evidentiary hearings. With respect to the matters referred to it, a Hearing Committee submits a report to the Board setting forth the committee's findings, conclusions, and recommendations.[2]

Rule 10.4 of the Rules of the Board on Professional Responsibility states that with respect to the conduct of hearings by the Hearing Committee, that "Bar Counsel shall have the burden of proving violations of the disciplinary rules by clear and convincing evidence." Rule 12.6 of the Board's Rules states that "[w]hen reviewing the findings of a Hearing committee, the Board shall employ a 'substantial evidence on the record as a whole test." The Court of Appeals have stated in opinions that under its own rules it is "required to 'accept the findings of fact made by the Board unless they are unsupported by substantial evidence of record, . . . and must 'adopt the recommended disposition

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[1]Rules Governing the Bar of the District of Columbia, Rule XI, Section 4(1).

[2]Rules Governing the Bar of the District of Columbia, Rule XI, Section 4(3)(c).

of the Board unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or otherwise would be unwarranted.' D.C. App. R. XI, Sec. 7(3); *In Re Smith*, 403 A.2d 296, 302-303 (D.C. 1979)."

In its decision issued on January 11, 1984, a three-judge panel of the Court of Appeals for the District of Columbia concluded that Petitioner herein, Melvin M. Burton, Jr., had violated Disciplinary Rule DR 9-102(A) (now DR 9-103(A) (failure to deposit funds of a client in a separate account) and DR 1-102(A)(4) ("dishonesty, fraud, deceit, or misrepresentation").[3]

The Court ordered that the Respondent be disbarred. The Court's decision and order were consistent with the conclusions and recommendation of the Board on Professional Responsibility which had confirmed the report of the hearing committee in Case Nos. M-143-82; 83-492, and the report of the Hearing Committee in case Nos. 224-79; 245-81, where the Board on Professional Responsibility increase a Hearing Committee's sanction of Four (4) years suspension to that of disbarment.

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[3]Disciplinary Rule 9-102 (A) provides in pertinent part: DR9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein...

Disciplinary Rule 1-102(A)(4) provides:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

The facts giving rise to the matter in Case No. 143-82; 83-492 are as following:

On February 9, 1979, pursuant to an Order of the Superior Court in Civil Action No. 7965-77 RP, (Wilkins et al, v. Anderson, et al), the Respondent was appointed as Trustee to sign on behalf of the heirs, a Deed conveying real property known as Lot 5, Square 397 as improved by premises 1535 9th Street, N.W., Washington, D. C.. Said premises were sold for the sum of $18,000.00

The Court Order appointing the Respondent as Trustee provided that the Respondent Trustee would convey the property, receive the proceeds after the discharge of emcumbrances, liens, costs, make appropriate adjustments as provided in the Contract of Sales, dated, November 23, 1976, and pay the proceeds into the registry of the Court. (Respondent's Exhibit #1). The Order neither provided for bond nor required an accounting by the Office of the Auditor, Superior Court of the District of Columbia.

The Respondent received the proceeds from the sale in the amount of $12,777.83, and although not required, opened another general Trust Account where said funds were deposited. All subsequent funds received from the transaction, were similarily deposited.

After receipt of the proceeds of the sale, Gladys Anderson, one of the beneficiaries of the proceeds to the Respondent for re-imbursement with regard to the property, a list of expenses incurred by her prior to the sale. Her Attorney, also presented for re-imbursement in connection with the property, expenses incurred by him prior to the sale. In order to get guidance on what expenses were proper for re-imbursement, the Respondent sort and received the guidance of the Deputy Auditor Master.

After getting the guidance of the Deputy Auditor, the Respondent was able to verify most of the expenses which had been presented for re-imbursement, made re-imbursement of the expenses verified, withdrew the Trustee Fee allowed per the Rules of the Superior Court and was prepared to deposit the remainder of the funds pursuant to the Order of Appointment into the Registry of the Court.

That before Respondent could make the deposit into the Register of the Court, the beneficiary, Gladys Anderson presented to the Respondent, additional expenses for re-imbursement. Being unable to resolve the conflict which arose with respect to whether the expenses were proper for re-imbursement, the Respondent after checking with the Auditor's Office decided to file an accounting with the Auditor's Office so that that office could make the determination as to which additional expenses could properly be re-imbursed, prior to depositing the funds into the Registry of the Court. Due to the delay in the Auditing process which took approximately one and one-half year to complete and because of the receipt of additional small sums of money representing unauthorized payment made by the Title Company and escrowed funds, the Respondent timely filed with the Auditor's Office, Three (3) additional accounts, reporting receipt of the additional funds.

That on or about November 14, 1979, while the Four (4) accounts were pending with the Auditor's Office, for auditing, when the Respondent was at Trial in the Superior Court defending a malpractice suit against the Estate of a deceased Attorney, the Respondent was approached at a recess by members of the Pailin family who were not parties to the on-going trial, who implored the Respondent to make payment of funds that may have been due to Ms. Pailin so

that she would be released from jail. A Superior Court Judge had ordered as a condition of Ms. Pailin's release that she deposit with the Court at least Seventy-five (75%) percent of any funds due her, which she had refused to do. The funds were due Ms. Pailin in another unrelated matter. Because of the difficulty of the Trial in which the Respondent was involved, the Respondent inadvertently caused to be paid to the Pailen family, the sum of $3,300.00 from the wrong trust account. The inadvertence occurred when the Respondent did not discern at that time that a secretary from his office, at Respondent's request, had brought to court for Respondent to sign, a check from the wrong Trustee account.

The Respondent did not discover that the check given to the Pailins had not come from his other Trustee Account, maintained at the same bank, until early December while reviewing his bank statements.

After completion of the Auditing process, the Auditor's Office requested proof of the amount of funds on deposit for which the Respondent was accountable. The Respondent presented to the Auditor, proof that the funds for which he was accountable were intact in the Trustee Account and at the same time explained to that Auditor the inadvertence which had occurred with respect to the Trustee Account. He also explained that during the period since the inadvertence, the Respondent had utilized the Account as a regular trust account and had deposited more than $40,500.00, into the account. The above amount however, did not include the deposit of $10,500.00, plus a return of the Trustees fee in the amount of $400.00. The Respondent, while Trustee was accountable at most for $13,000.00, and ultimately accountable for depositing unto the Registry of the Court, the sum

of $10,495.99, which funds were intact in the account when the Respondent was requested to submit proof of the funds on deposit and which amount was subsequently deposited into the Registry of the Court.

That a hearing was held on the irregularity in handling the account, and the Auditor Master's Report filed with the Court recommended that the Court," *consider referring the matter to the Committee on Professional Responsibility*". (Emphasis supplied)

That thereafter, the Court considered the Report of the Auditor-Master and approved the Report without a referral to the Committee on Professional Responsibility.

That on or about March 18, 1981, pursuant to an Order of the Court ratifying the Auditor-Master's Report, except for the referral to the Committee on Professional Responsibility, the sum of $10,495.99 was deposited into the Registry of the Court. The Court Order discharged the Respondent from his fiduciary Responsibilities upon his timely making the required deposit.

That at the Hearing before the Auditor Master on the irregular handling of the account, Respondent in testifying concerning the money he collected during the year 1979, when asked by the Auditor, gave the answer, in excess of $150,000.00.

That at the Hearing before the Hearing committee, the Respondent presented testimony that he had practiced law for 25 years, had a good standing at the Bar and that his reputation for truthfulness and honesty was of the highest quality.

Further, the Respondent presented testimony that there had been no prior history of the Respondent ever having to

appear before a Hearing committee and that he had performed invaluable community services without charge with community-based organizations as Chairman and Board Member of the Neighborhood Legal Services; Member of the Advisory Council for the District of Columbia, Small Business Administration; Chairman of the Board of Directors for Cromwell Academy, a private school in the District of Columbia: Co-Chairman of the 1972 Fund Drive for the Washington Cathedral; Chairman of an Ad Hoc Committee for the District of Columbia to make recommendations to Minimum Wages for Hotel and Restaurant Workers: Vice-Chairman, of the D.C. Coalition for Self-Determination; Co-Chairman of the Committee to Support the Advisory Neighborhood Councils (Now Advisory Neighborhood Commissioners); commenced in his office, internships for third year Howard University Law Students and served as counsel without charge for indigents during the 1968 Civil disturbances in the District of Columbia.

The facts showed that the Respondent had been active poitically in the Republican Party for the District of Columbia where he served as Vice-Chairman of the D.C. Republican Committee and that he has been involved in fund raisings for the United Way, NAACP and the Urban League.

Further, the facts showed that as an Attorney, the Respondent's reputation in the Office of the Register of Wills where he had handled more than 100 cases as either Guardian, Guardian Ad Litem, Conservator, Executor or the Attorney for others serving in those capacities was impeccable, without there ever being any impropriety, defaults, summary removal, bond revocation or any question concerning his handling of those matters. The facts showed

that the Office of Register of Wills on several occasions had appointed the Respondent to clear up matters of Estates handled by other Attorneys; that the Respondent was hired by an Attorney with the approval of the Office of Register of Wills to handle an estate matter involving multi-litigation including a malpractice claim against the Attorney's Estate and other matters, netting to the Estate, funds that were thought to be unobtainable and that as an Attorney, he performed diligently and acted in a responsible manner towards his clients.

The fact in Case No. 224-79; 245-81 are:

That during the course of the representation of Veterans Administration in property matters, which representation predated the year 1972, the Respondent, during the year, 1979, was requested by Veterans Administration as foreclosure Attorney to foreclose on a loan which was held by Veterans Administration on which the makers, Nathaniel and Loretta Pailin had defaulted.

That as a result of said foreclosure, on or about July 6, 1978, the Respondent received a check from the settlement company, District Realty Title Insurance Corporation in the amount of $26,378.16. That said funds (less a deduction of $1,505.90, not here in question) were placed in "Trust Account" No. 3-045-80-3, with the National Bank of Washington.

After depositing the check, on or about July 15, 1978, the Respondent paid to Veterans Administration, the sum due it of $16,639.68 and presented to Veterans Administration a preliminary distribution statement pending a complete distribution which would show in what manner the funds after payment to Veterans Administration were to be distributed.

That subsequently, because of delay, due to inability to locate Mr. & Mrs. Pailin, and the Court ordered delay in payment to Mrs. Pailin, Mrs. Pailin received the funds due her. That the amount of funds due Mrs. Pailin was based upon a balance statement prepared December 15, 1979, showing expenditures made in this matter. That the Respondent had made efforts to locate Mr. Pailin to pay him but had been unsuccessful in locating him and he had not been paid. That the Respondent may or may not have been told of the efforts made by Veterans Administration to locate Mr. Pailin and the subsequent location of Mr. Pailin by Veterans Administration.[4]

That subsequent to the payment to Veterans Administration, the Respondent made other payments by checks from the Trust Account No. 3-0 45-803, which account was not specifically marked as a Veteran Administration Account, which were not recognizable by Mr. Fallon, the representative from Veterans Administration. That Veterans Administration had no concern with expenses connected with the foreclosure on said property; that there may have been legal and other expenses connected with the foreclosure as well as settlement expenses with the purchaser and that Veterans Administration looked only for payment of its own lien and for a statement of final distribution.

That with reference to the checks written after the receipt of the proceeds of the foreclosure sale representing payments made from the Trustee Account, the representative

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[4]Upon learning of the address of Mr. Pailin from Veterans Administration, funds due Mr. Pailin were remitted to him on December 15, 1982. (Petition for Hearing *En Banc* page 9).

Administration could not identify them as being inappropriate payments, and that those payments were of no particular concern to Veterans Administration because the agency had no concern of daily activities of the Respondent for property which no longer owner by it.

REASON FOR GRANTING THE WRIT

A. Where a new definition is adopted for Disciplinary Rule 9-102(A) and the prescribed sanction thereunder is disbarment, to apply the standard and sanction to conduct which occurred prior to the adoption of the new definition is a violation of the Fifth Amendment to the United States Constitution and has *Ex Post Facto* implications...

Bar Counsel charged the Respondent with a violation of Disciplinary Rule 9-102(A).

In proof of his case, Bar Counsel neither called nor presented witnesses with respect to the charge but relied upon the Exhibits which were Bank Statements and Cancelled Checks of the Respondent, admitted in evidence over the objection of the Respondent.

In his opening statement, Bar Counsel stated that "Respondent's unauthorized withdrawal from the trust account for purposes and uses totally unrelated to the trust violated Disciplinary Rule 9-102(A), *because he failed to mention the trust proceeds in a trust account as required by that disciplinary rule*."

At the Conclusion of the Hearing, the Chairman in addressing himself to Bar Counsel, stated, "As I understand it, one of the disciplinary rules which Bar Counsel contends has been violated here is Disciplinary Rule 9-102, which is styled, preserving *identity of funds and property of a client*, is that correct?"

Bar Counsel Answered, "That's correct".

Despite reliance upon and defense of the charge of Commingling by the Respondent, after close of the hearing, Bar Counsel in his Post Hearing Brief informed the Hearing

Committee and the Board for the first time that it had proceeded on the theory that Respondent's Misappropriation, conversion and commingling of trust funds violated Disciplinary Rule 9-102(A)." (See Bar Counsel's Post Hearing Brief, pg. 4)

In other cases, misappropriation as distinct from commingling has been charged under DR 1-102(A)(4). See, e.g., *In the Matter of Burka*, 423 A 2d 181, 183, 186-187 (D.C. App. 1980) (*en banc*). Bar Counsel did not in the charge in M-143-82, intend it to be more than commingling and indicated as much upon inquiry by the Chairman of the Hearing Committee. *(Anderson vs. Burton)*.

Bar Counsel conceded the charge of commingling only, when he asserted at page 3 of his Opposition to the Petition *En Banc*, "In any event, although Respondent was not charged with DR 1-102(A)(4) in No. M-143-82, (hereinafter the *Anderson* case), he was charged with DR 1-102(A)(4) in No. M-83-192 (hereinafter the *Pailin* case", "---."

In June, 1983, in *In Re Harrison*, 461 A.2d 1034 (D.C. 1983), the Court below prescribed for the first time in this jurisdiction, the definition and sanction which is to be applied to Misappropriation cases with the newly numbered Disciplinary Rule, 9-103;

The Court below in adopting the findings of the Board on Professional Responsibility has fostered a new concept which not only allows Bar Counsel to raise Post Hearing, the level of a charge against a Respondent and a charge which the Respondent had no opportunity to defend but the Court's findings, further allowed the Board of apply to definition which was newly adopted and not in effect at the time of the alleged misconduct complained of herein.

The application by the Court of the newly adopted defini-

tion which should not have been applied to the Respondent inured to the prejudice and detriment of the Respondent and was violative of his due process rights and equal protection of the law.

The application of the *Harrison* definition to the Pailin case (No. 83-492), even if that case is supported by substantial evidence, allowed for an *Ex Post Facto* application of a Rule not in effect at the time of the alleged misconduct and is a violation of the due process requirement of the Fifth Amendment.

In *In re Ruffalo*, 390 U.S. 544, 551 (1968), this court held that disciplinary proceedings against attorneys "are adversary proceedings of a quasi-criminal nature..." Because such proceedings may result in "a punishment or penalty imposed on the lawyer...[h]e is accordingly entitled to procedural due process..." *Ruffalo, supra*, 390 U.S. at 550. Thus, the privilege of practicing law is not "a matter of grace and favor", but rather a right that cannot lightly or capriciously be taken from an attorney; the power to withdraw that right "ought always to be exercised with great caution". *Charlton v. F.T.C.*, 543 F.2d 903, 906 (D.C. Cir. 1976), citing *Wilner v. Committee on Character and Fitness*, 373 U.S. 96, 102 (1963); *Ex Parte Wall*, 107 U.S. 265, 288 (1883); and *Ex Parte Garland*, 72 U.S. (4 Wall) 333, 379 (1867).

It is submitted that the issue of whether the application of the newly adopted Harrison definition to the instant case denied the Respondent due process required in these matters and whether the application of the Standard had *ex post facto* implications are sufficiently important in the handling of disciplinary matters to merit this Court's attention.

B. When a newly adopted sanction for disciplinary Rule 9-102(A) is that of disbarment and the sanctions imposed by different panels of the Court ranges from suspensions to disbarment for similar conduct, the disparity in the imposition of sanctions is a violation of the Fifth Amendment.

In June, 1983, one panel of the Court in the case of *In Re Harrison*, 461 A.2d 1034 (D.C. 1983), announced the definition and sanction for misappropriation which is to be applied in this jurisdiction. Until that time, there was no clear cut definition of misappropriation for the District of Columbia as corroborated by an article published by Bar Counsel which appeared in the "*Legal Times*" dated, February 6, 1984, wherein Bar Counsel stated that the Bar had asked the Court of Appeals to announce that in the future, misuse of client's funds will result in disbarment.

The ruling by that panel of the Court in adopting the *Harrison* definition, ordered by the imposition of a sanction less than disbarment, yet another panel of the Court, imposed a sanction in the case at bar end and in one other case, (*In Re McLean* No. M-142-82, January 11, 1983) which was at odds and in conflict with the Harrison sanction as well as the sanction imposed in *In Re Cefarratti,* No. M 140-82, decided June 28, 1983 and in *In Re Hines*, Docket Nos. 194-80 and 447-79 (BPR October 28, 1982). The effect of these Rulings has resulted in an inharmonious ruling from different panels of the Court and a review by this Court is needed to clarify for the bar at large the applicability of the *Harrison* definition and the imposition of sanctions with respect thereto.

Moreover, except for the cases of *In the Matter of Quimby,* 123 U.S. App. D.c. 273, 359 F.2d 257 (1966), in which this Board and Court did not participate, the case of *In the Matter of Burka*, 423 A 2d 181 (D.C. App. 1980) (*en banc*), where the Respondent was charged with and found to have violated DR 9-102 (A) and (B) and DR 1-102 (A) (4) and (5), where funds were withdrawn from an Conservatorship Estate Account and *In Re McLean*, No. M 142-82, April 11, 1983, where the Respondent misappropriated funds from negligence and workmen's compensation cases, all other White Attorneys charged with similar conduct as the Respondent have received lesser sanctions.

It is particularly noticeable that the Respondents in the foregoing matters, all of whom were White, received lesser sanctions and those sanctions should be contrasted with the sanction imposed upon the Respondent herein, who is a Black Attorney. (In The Case of *In Re Newsome,* No. D 34-79 (D.C. November 21, 1979) who is Black, disbarment arose because of a conviction in the United States District Court involving funds from a negligence case).

Moreover, in light of the Court's opinion in *In Re Harrison*, supra, where the Court announced a definition for misappropriation *for the first time* in this *jurisdiction* it would appear that along with the disproportionate sanction imposed upon White Respondents for similar violations, that the Court applied its definition of misappropriation retroactively and inappropriably applied the *Harrison* definition to conduct which was not so clearly defined at the time of the occurrence.

These factors warrant the Court giving this matter its attention by granting the request for a Writ of Certiorari.

C. Where the Board on Professional Responsibility uses evidence of a prior adjudicated disciplinary proceeding to assist it in reaching a determination in a new and unrelated proceeding, the doctrine of estoppel is applicable and the due process requirement of the Fifth Amendment is violated.

The decision by the District of Columbia Court of Appeals appears to sanction the right of Bar Counsel to bifurcate proceedings and proceed at its discretion to elicit testimony from a Respondent on a matter which it did not charge, when it could have brought both charges against the Respondent at the same time.

In the Anderson matter the Respondent was cross-examined extensively on the Pailin Matter, which matter was not charged in that proceeding by Bar Counsel, although Bar Counsel had complete and total knowledge of the circumstances of that matter.

The following portions of the Transcript of the cross-examination by Bar Counsel amply demonstrates this fact.

Q. And you wrote the check to a former client, Mrs. Pailin?
A. Well, Mrs. Pailin was not a client of mine.
Q. Oh, I understand, I withdraw that question?
A. But, I wrote it as a result of a transaction that evolved.
Q. You owed her the money?
A. Yes sir.
Q. You owed her $3,300.00 and maybe some more money at the time that you wrote her this check inadvertently, is that correct?
A. Yes.

Q. And you wrote that check on the 14th day of November, is that correct?

A. Yes.

Q. You testified that when you wrote the check to her inadvertently, that you really didn't know that you didn't have enough funds in the other account?

A. No, sir, I didn't say I didn't know. I said at the time I didn't know whether I did or did not, I just didn't know. All I could fathom on at that time was writing the check. Mentally, you know, you've gone through things in a Court recess, you're thinking, and all I can remember is trying to...I know I put in 5,000 in that account in a 15-day period or so, I knew it was 4,000 or 5,000 and I just thought that it might have been there.

Q. Did you owe Mr. Nathaniel Pailin as a result of your transaction?

A. Yes.

Q. Had you paid him at the time you had wrote this check to Mrs. Pailin?

A. I have not paid Mr. Nathaniel Pailin because I don't know where Mr. Nathaniel Pailin is.

Q. Did you...

A. Yes, I wrote Mr. Nathaniel Pailin a letter.

CHAIRMAN MILLER: Just a second, let Mr. McClendon ask the question before you answer.

Q This is your Exhibit #2, would you read the last paragraph?

Q. First of all, would you give the Committee the date of this letter?

A. The date of the letter is September 17th, 1979, and it says, "Finally, I understand that the delay in the dis-

tribution of the balance of the foreclosure proceeds are occasioned by the inability to locate Mrs. Pailin's husband. I've taken the liberty of contacting the Department of the Army, Retired Personnel Locator, about Mr. Pailin. That office carries his address as follows: S.F.C. Nathaniel Pailin, Retired, 809 West 232nd Street, Apartment 2B, Torrance, California 90502. Please do not hesitate to call me if any further questions arise in this matter."

Q. Did you make any efforts to contact Mr. Pailin?

A. Yes, sir. On two occasions I wrote letters; only one of which came back. In the meantime, I also picked up the telephone one day in an effort to try to get a number for him at that address; was unable to do so.

Q. You received this document, apparently from the Department of Army; did you ever contact the Department of Army to see whether or not they had a more recent address for Mr. Pailin?

A. No, this from the Office of the United States Attorney.

The question which should be considered by this Court, is to what extent should this procedure be permitted and does this procedure, if permitted, guarantee the Bar at large the fairness dictated by the Due Process Requirement in Disciplinary Proceedings.

D. Where Disciplinary Rule, Chapter 8, Section 3(1)C grants a Respondent a right to challenge hearing panel members, it is a violation to the due process clause of the Fifth Amendment and the Sixth Amendment rights of a Respondent to deny him the right to conduct a *Voir Dire* of the hearing panel members.

Disciplinary Rule, Chapter 8, Section 3(1)C, provides a following:

> "The chairman shall then identify himself and the other members of the Committee and inquire if there are challenges to any member of the Committee".

Chapter 8, Section 3(1)D, provides as following:

> "Should challenges result in the departure of the Chairman---"

Implicit within these Rules is the requirements that information may be gained from the panel members through *voir dire* examination which would provide an intelligent basis for the exercise of challenges. Despite having information and knowledge of the panelist backgrounds and assuming that investigation of their background was had, the information gained through the investigation is meaningless without the opportunity too further explore the leads derived through investigation, which may lead to the challenge of a panel member.

If the Respondent is to obtain full knowledge of all relevant and material facts that might bear on the disqualification of a panel member, then *voir dire* examination of the panel members is essential, so that, the Respondent may fairly and intelligently exercise the right to challenge.

It has been said that the ultimate function of voir dire examination is to explore the nuiances of conscience to determine whether a prospective person is able to participate fairly in the deliberations on the issues, confining his judgment to the facts presented. *Crawford v. Bounds*, (CA 4 NC) 395 F.2d 297.

The denial of the Respondent's right to *voir dire* examination of the panel members violated not only the Rules of Procedure adopted by the Board on Professional Responsibility but it also violated the District of Columbia Code at § 13-701 and Section 23-107.

District of Columbia Code, Section 13-701(C), provides:

> C. This section does not deprive a person of the right to challenge the array or poll of a panel returned, or to have all or any of the jurors examined on their *Voir Dire* before the list is prepared to determine their competency to set in a particular case.

The right of challenge has its source in the common law, and has always been an essential ingredient of a jury trial and has been codified in the D.C. Code at 13-701 and 23-107. The District of Columbia Court of Appeals, no doubt had in mind, when it promulgated the rule which allows for a challenge, to also allow *voir dire* examinations of the panel members so as to insure that an accused Respondent would have a fair and impartial hearing that is mandated by case law in matters of this type. See *In Re Thorup*, 432 A 2d 1221 (D.C. 1981), citing *Charlton v. Federal Trade Commission*, 177 U.S. App. D.C. 418, 543 F2d 903, (1976).

This Court obviously does not want to curtail this right and therefore this Court should make a determination concerning the meaning and implication of the Disciplinary Rule, Chapter 8, Section 3(1)C, so as to afford an optimum of due process in Disciplinary Proceedings.

> E. Where the Court has been requested to consider referring a matter concerning the conduct of a Court appointed Trustee to the Board on Professional

Responsibility, but does not do so, the Board on Professional Responsibility does not possess quasi-judicial authority to empower it to conduct a hearing on the conduct of the court appointed trustee.

Section 4(3)(a) of Rule XI of the District of Columbia Court of Appeals for the Governance of the Bar states:

(3) The Board shall have the power and duty:

(a) to consider and investigate any alleged grounds for discipline or alleged capacity of any attorney called to his attention, or upon its own motion, and to take such action with respect thereto as shall be appropriate to effect the purposes of these Disciplinary Rules.

Under this Rule, it appears that a referral by the Superior Court or any person concerning the conduct of an attorney is not necessary to give the Board jurisdiction to consider and investigate an attorney's conduct.

The Auditor-Master's Report herein contained a recommendation that the Court consider the advisability of referring the matter to the Office of Bar Counsel for appropriate action by Order dated, March 11, 1981, the Superior Court ratified the Auditor-Master's Report dated February 12, 1981.

In ratifying the Auditor-Master's Report, the Court did not refer the matter to Bar Counsel and made no reference to the Auditor-Master's recommendation of referral.

The Board found that:

"In our view, neither we nor the Board of Professional Responsibility is precluded from reviewing respondent's conduct because the court did not specifically refer the matter to the Office of Bar Counsel. The Court, in ratifying

the Auditor-Master's report, did not purport to make a determination whether Respondent breached his fidicuary duty as trustee. The court's order is silent with regard to whether Respondent's conduct warranted a referral to the Office of Bar Counsel, and no inference properly can or should be drawn from that silence. Thus, the court's action in this regard does not preclude this Committee from determining whether Respondent's conduct was in violation of the Code of Professional Responsibility. Nor does the court's action constitute a determination that Respondent breached his duties as trustee."

The Superior Court of the District of Columbia has general equity powers in matters pertaining to Trustees. *D.C. Code Section 11-921, 1973 Edition*, as Amended. These powers apply to the appointment of Trustees, their removal, discharge of Trustees and the settlement of their accounts.

The Court has supervisory control over any matter which concerns the trust, its Administration, its preservations and its disposition and any other matter wherein Trustees are affected in the discharge of their duties toward the trust.

Therefore, when the Court has exercised its supervisory powers and ordered a Trustee discharged as in the instant case, without referring the matter to the Board as recommended, the Court has passed upon the performance of the Trustee toward the trust and the Board may not second guess the Court without subverting the Court's authority.

That the Court did not purport to make a determination of whether the Respondent breached his duty as the board contends is untenable, so is the contention that no inference may be drawn from the silence of the Court on the matter of the referral, in its Order of Ratification of the

Auditor-Master's Report. To adopt the aforesaid contentions is paramount to charging the Court with negligence or misfeasance. In fact, the Court having before it the request to consider referral, giving due interpretation to the appointing Order and its requirement that the Respondent pay the funds into the Registry of the Court, observed that the duties and responsibilities of the Respondent had been fulfilled and saw no need to refer the matter to Bar Counsel.

Moreover, submission of the report to Auditor-Master for auditing purpose was surplusage.

The presumption prevails that the Court did its duty. In fact, the board impugned the integrity and sagacity of the Court. For the Court below to have affirmed the findings of the Board concerning the non-referral, undercuts the authority of the Superior Court and this Court's review is warranted in order to preclude the decision from having far reaching consequences.

F. Where the Board on Professional Responsibility makes a finding that substantial evidence was present to support its findings but the evidence it considered was not clear and convincing, the Board on Professional Responsibility has not afforded a Respondent due process as required in disciplinary proceedings.

In Bar Docket No. 224-79, Appeal No. 83-492, Bar Counsel did not show by clear and convincing evidence that misappropriation had occurred. This conclusion is true, despite the introduction of some checks from the trust account with payees name which appeared to be indecipherable.

In substantation of this conclusion the Veterans Representative testified that he saw or could find no evidence of wrong doing.

Mr. Fallon, the Veterans Administration Representative, stated that the duties of the Trustee were to pay off the liens, take out the expenses of the foreclosure, and distribute the surplus top the mortgage holder and that was all that was required. Further that Veterans Administration was paid and Mrs. Pailin was paid; the Respondent was having difficulty finding Mr. Pailin and that he did not handle the portion of the case relating to advising the Respondent of the address for Mr. Pailin.

Further he offered testimony to the effect that:

> "Again, I don't see where that would be of a particular concern to the Veterans Administration, other than ultimately to know about it, because we feel that we have no obligation to know the terms of the Deed of Trust in which we are the holder and have appointed a substitute trustee have been carried, but we would not expect Mr. Burton to tell us his daily activities in connection with the property that did not belong to us any more".

The Hearing Committee was persuaded by this testimony because it concluded:

> "1. That the case relied upon by Bar Counsel, In the *Matter of Quimby*, III, 359 F2d (D.C. Cir 1966) went far beyond the bare bones financial records of the accused and that in this matter the evidence against the Respondent is limited to the bank records of a particular trust account with no testimony.

"2. That there was no other evidence showing the ultimate use or purpose of the withdrawals from the trust account causing it to be less than the amount due to the Veterans Administration and the Pailins.

"3. The individuals who received checks drawn on the bank account were not called as witnesses.

"4. No testimony is in the record to show to what extent the funds were used for the Respondent's personal use.

"5. There was no testimony or other evidence in the form of an analysis of the Respondent's client's accounts on which to evaluate the extent of Respondent's misuse of client's funds and

"6. The evidence herein consist primarily of the barebone bank account records, which standing alone, do not permit an informed judgment.

The Court adopted the findings of the Board without comment with respect to these findings. In a matter of disbarment with rudiment of due process and equal protection of the law under the Constitution, whose livelihood is being deprived, require a greater standard upon review than merely adopting the findings based upon a substantial evidence test.

This Court's attention should be directed to the standard of review required of the Court in considering disciplinary proceedings.

G. In reviewing a disciplinary proceeding, the due process provision of the Fifth Amendment requires both the Board on Professional Responsibility and the District of Columbia Court of Appeals to utilize a standard greater

than the substantial evidence test in order to support its findings.

Matters of Attorney discipline are, the ultimate responsibility of the District of Columbia Court of Appeals. *In Re Dwyer*, 399 A.2d 1, 11-12 (D.C. App., 1979) Citing Sections 11-2502 and 11-2503(b), D.C. Code, 1973; (*F Powell v. Nigro*, 543 F. Supp. 1044, 1046 (D.C. 1982). This responsibility cannot be relegated to the Board of Professional Responsibility by delegating it to the Board and then allow the Court to utilize a standard of review similar to that used when reviewing a decision of an administrative agency.

In the case of *In Re Colson*, 412 A.2d 1160, 1175 (D.C. App. 1979), the dissent therein demonstrated the aforesaid view when it was stated, "the basic decisional responsibility for the sanction to be imposed in a disciplinary proceeding should rest upon the judges of a jurisdiction's highest Court, rather than upon the members of a Court-created disciplinary body. After all, our Board of Professional Responsibility *is not akin to an Administration Agency*". (Emphasis Supplied).

In the instant case, the District of Columbia Court of Appeals used a standard based upon the "substantial evidence test.

In *Addington v. Texas*, 441 U.S. 418, 423 (1979, this Court, citing its earlier decision in *In Re Winship*, 397 U.S. 358 (1970), stated that "a standard of procedure is embodied in the Due Process Clause", and that the function of such a standard is to "instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type adjudication".,

The Court in *Addington* described as one of the three levels of standard of proof, thusly:

> "The intermediate standard...usually employs some combination of the words 'clear,' 'cogent,' 'unequivocal,' and 'convincing,'... One typical use of standard is in civil cases involving allegations of fraud or some other quasi-criminal wrong doing by the defendant. The interest at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the 'clear, unequivocal and convincing' standard of proof to protect particularly important individual interests in civil cases...(deportation) ...(denaturalization)..." 441 U.S. at 424-425.

In *In Re Ruffalo*, 390 U.S. 544, 551 (1968), this Court held that disciplinary proceedings against attorney's "are adversary proceedings of a quasi-criminal nature..." Because such proceeding may result in "a punishment or penalty imposed on the lawyer...[h]e is accordingly entitled to procedural due process..." *Ruffalo*, supra, 390 U.S. at 550. Thus, the privilege of practicing law is not "a matter of grace and favor", but rather a right that cannot lightly or capriciously be taken from an attorney; the power to withdraw that right "ought always be exercised with great caution". *Charlton v. F.T.C.*, 543 F2d 903, 906 (D.C. Cir. 1976), citing *Wilner v. Committee on Character and Fitness*, 373 U.S. 96, 102 (1963); *Ex Parte Wall*, 107 U.S. 265, 288 (1983); and *Ex Parte Garland*. 72 U.S. (4 Wall) 333, 379 (1867).

Applying this Court's decision in *Ruffalo,* and *Addington* to Attorney disciplined proceedings, I submit that a substantial evidence test does not pass constitutional muster. Given that such discipline imposes a punishment or penalty on the lawyer, *(Ruffalo; supra*), and taking into consideration that disbarment, that is, the taking away of the livelihood and the right to practice law, great caution ought be exercised when dealing with a curtailment of that right. (*Charlton v. F.T.C., Supra*). Accordingly, when reviewing findings of the Board by the District of Columbia Court of Appeals nothing less than utilization of the "Clear and convincing" standard can be said to provide due process.

CONCLUSION

For all of the reasons set forth herein, Petitioner request that this Court grant this Petition and issue a Writ of Certiorari to the District of Columbia Court of Appeals.

Respectfully submitted,

Charles A. Brady
1343 Pennsylvania Avenue, S.E.
Washington, D. C. 20003
332-7600

Dated: May 2, 1984

NO: 83-1836

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

MELVIN M. BURTON, JR.
A Member of the Bar of the
District of Columbia of Appeals

PETITIONER,

VS

BOARD ON PROFESSIONAL RESPONSIBILITY OF DISTRICT OF COLUMBIA COURT OF APPEALS

RESPONDENT,

APPENDIX

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. M-143-82; 83-492

IN THE MATTER OF MELVIN M. BURTON, JR., RESPONDENT

A Member of the Bar of the
District of Columbia Court of Appeals

(Argued December 15, 1983 Decided January 11, 1984)

Samuel McClendon, with whom *Thomas H. Henderson, Jr.*, Bar Counsel, and *Fred Grabowsky*, Bar Counsel at the time the brief was filed, were on the briefs, for petitioner.

Charles A. Brady for respondent.

Before: NEBEKER, FERREN, and BELSON, *Associate Judges.*

ORDER

PER CURIAM: In these two disciplinary cases, respondent is charged with commingling and misappropriation of funds held in a fiduciary capacity as a court-appointed trustee, as well as with misrepresentation to the Auditor-Master. The Board on Professional Responsibility has recommended in each case that respondent be disbarred from the practice of law. We conclude that the records support the Board's findings of fact and that respondent violated Disciplinary Rules DR 9-102(A) (now DR 9-103(A)) (failure to deposit funds of client in a sepa-

rate account)[1] and DR 1-102(A)(4) ("dishonesty, fraud, deceit, or misrepresentation"). We therefore agree with the Board's recommendation of disbarment, as set forth more fully in the Board's Reports and Recommendations appended hereto and incorporated herein by reference.

Accordingly, it is ORDERED that respondent, MELVIN M. BURTON, JR., is disbarred from the practice of law in the District of Columbia. *See In re McClellen*, No. M-51-80 (D.C. March 26, 1981); *In re Burka*, 423 A.2d 181 (D.C. 1980) (en banc); *In re Newsome*, No. D-34-79 (D.C. November 21, 1979); *In re Quimby*, 123 U.S. App. D.C. 273, 359 F.2d 257 (1966) (per curiam). This order shall be effective thirty (30) days from the date of this opinion. D.C. Bar R. XI, § 19(3).

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[1] DR 9-102 was renumbered DR 9-103 on April 30, 1982, when this court amended the Code of Professional Responsibility with the "revolving door" rules, now DR 9-101, -102. ("*Revolving Door*"), 445 A.2d 615, 618 (D.C. 1982) (en banc).

BOARD ON PROFESSIONAL RESPONSIBILITY
DISTRICT OF COLUMBIA COURT OF APPEALS

Bar Docket No. 323-80

IN THE MATTER OF MELVIN M. BURTON, JR., RESPONDENT

REPORT AND RECOMMENDATION OF BOARD ON PROFESSIONAL RESPONSIBILITY

This case arises out of improper commingling and misappropriation of certain funds received by Respondent in his capacity as a court appointed Trustee. The offense was then highlighted by a false statement made by Respondent to the Auditor-Master in an evidentiary hearing held in connection with an audit of Respondent's Trustee accounts.

The matter has been considered by Hearing Committee Five consisting of George W. Miller, Esq., Walter T. Skallerup, Jr., Esq., and Mrs. Rosemarie Brooks. The Committee has recommended that Respondent be disbarred.

The findings of fact contained in the Hearing Committee's report are supported by clear and convincing evidence and are adopted by this Board. The Board also approves the Committee's conclusion that these findings require that the Respondent be disbarred.

The Board can do no better in its report to the Court than to adopt as its own the substantive portions of the Hearing Committee's report which are set out below:

FACTS

Respondent has practiced law in the District of Columbia for 25 years with no prior discipline assessed against him. On February 9, 1979, pursuant to an order

of the Superior Court of the District of Columbia in Civil Action 7965-77 RP (*Wilkens, et al.* v. *Anderson, et al.*), Respondent was appointed as Trustee to sell Lot 5, Square 397, located at 1535 - 9th Street, N.W., Washington, D.C. (Bar Ex. 2) On April 9, 1979, the real estate was sold for $18,000 less encumbrances, liens, costs and appropriate adjustments, as provided in the contract of sale dated November 23, 1976. (Bar Ex. 3)

On April 19, 1979, Respondent received $12,777.83 as the first payment from the sale of the real estate. (Respondent's Answer to Specification of Charges, ¶ 3) On April 30, 1979, Respondent opened a trust account at the National Bank of Washington, Number 6-177-34-4 (trust account) in which he deposited the $12,777.83 initial payment. Respondent subsequently deposited in the trust account additional proceeds from the sale of the real estate in the amounts of $500, $75, $38.61 and $25.98. (Bar Exs. 7-9)

During the period November 14, 1979 through January 14, 1981, Respondent made unauthorized withdrawals of funds from the trust account for his personal and business uses and for purposes not related to the trust, and made deposits from unidentified sources into the account. By making such unauthorized withdrawals and deposits, Respondent caused the trust account to have shortages and overages during the period stated above. Data for the trust account as of the closing dates of the monthly bank account statements are as follows:

	Actual cash on deposit at National Bank of Washington Account Number: 6-177-34-4	Amount that should have been on deposit in trust account	Shortage or Overage
*4/30/79	$12,777.83	$12,777.83	00.00
5/ 9/79	12,777.83	12,777.83	00.00

6/11/79	12,413.07	12,763.07	$ 350.00
7/11/79	10,768.44	11,118.44	350.00
8/ 9/79	10,026.80	10,376.80	350.00
10/10/79	10,101.80	10,451.80	350.00
11/ 9/79	10,041.80	10,451.80	410.00
12/11/79	6,541.80	10,451.80	3,910.00
1/10/80	6,233.25	10,451.80	4,218.55
2/11/80	5,841.25	10,451.80	4,610.55
3/11/80	3,941.25	10,451.80	6,510.55
4/ 9/80	191.30	10,495.99	10,304.69
5/ 9/80	3,824.82	10,560.58	6,735.76
6/10/80	1,560.41	10,560.58	9,000.17
7/10/80	5,757.81	10,560.58	4,802.77
8/11/80	5,332.81	10,560.58	5,227.77
9/10/80	3,221.94	10,560.58	7,338.64
10/ 9/80	9,791.60	10,560.58	768.98
11/12/80	10,191.60	10,560.58	368.98
2/10/81	10,611.60	10,560.58	51.02**

* indicates initial deposit
** indicates overage

(Bar Exs. 14A-R, 11 at 6)

On April 9, 1980, almost one year after it was established, the trust account contained $191.30, less than 2% of the $10,495.99 for which respondent then was accountable as fiduciary. (Bar Ex. 14K)

During the course of an audit of the Trustee's account, the Auditor-Master noted certain irregularities in the handling of the assets in the trust account. For the purpose of inquiring into the mishandling of estate funds, the Auditor-Master of the Superior Court scheduled a hearing on January 13, 1981. (Bar Ex. 11)

At the hearing before the Auditor-Master, respondent maintained that his actions did not endanger the security of trust assets because he had reserves of cash which were made up in part of revenues derived from his law practice. In order to establish his contentions, respondent on January 13, 1981 testified under oath before the Auditor-Master as follows:

> I'm making—I don't even know what I have grossed this year, but just to show you, last year I grossed in excess of $150,000. That was 1979. I don't know what I grossed this year. (Bar Ex. 10, p. 37)

Schedule C to respondent's Form 1040 (Individual Federal Income Tax Return) for 1979 reported a gross income from his trade or business of $58,073. (Bar Ex. 17)

Respondent acknowledged that his testimony under oath to the Auditor-Master of the Superior Court that his gross income for 1979 was in excess of $150,000 was inaccurate. (Tr. p. 62)

In view of the irregularities in the handling of the trust account, the Auditor-Master recommended that the Court consider the advisability of referring the matter to the Office of Bar Counsel for appropriate action. The Auditor-Master further recommended that the usual trustee fees and commissions not be allowed by the court. (Bar Ex. 11)

The court subsequently reviewed the report of the Auditor-Master and approved the report without a referral to the Office of Bar Counsel. (Bar Ex. 12)

DISCUSSION

Bar Counsel has charged that respondent's unauthorized withdrawal and commingling of trust funds violated Disciplinary Rule 9-102(A).[1] In addition, Bar Counsel

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[1] Disciplinary Rule 9-102(A) provides in pertinent part:

> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> (A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall

has charged that respondent's misstatement to the Auditor-Master of respondent's gross earnings for the tax year 1979 violated Disciplinary Rule 1-102(A)(4).[2]

I. *Respondent's Motion To Dismiss Based on Bar Counsel's Alleged Failure to Present A Prima Facie Case*

At the conclusion of Bar Counsel's case, respondent moved that the Hearing Committee dismiss the charges "on the basis that Bar Counsel has not presented a prima facie case. . . ." The Committee declined to dismiss the charges. It directed the respondent to go forward with his case, but reserved decision on the question of the sufficiency of Bar Counsel's proof. (Tr. 24-25)

Respondent has asserted that Bar Counsel did not make out a *prima facie* case because Bar Counsel called no witnesses and relied on exhibits which were irrelevant to the charges against respondent. (Respondent's Post Hearing Brief, pp. 10-12)

The Committee believes that respondent's contention that Bar Counsel failed to establish a *prima facie* case is without merit. Respondent did not contest the au-

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be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein. . . .

[2] Disciplinary Rule 1-102(A)(4) provides:

DR 1-102 Misconduct.

(A) A lawyer shall not:

* * *

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

thenticity of the exhibits offered by Bar Counsel.[3] The exhibits demonstrated that: 1) the Superior Court appointed respondent as trustee to sell realty; 2) respondent received payments for the sale of the realty; 3) respondent deposited the payments in a trust account; 4) respondent made a series of withdrawals from the trust account for personal and business purposes, and 5) respondent deposited money in the account that did not derive from the proceeds of the sale of the realty. Thus, the documentary exhibits offered by Bar Counsel were clearly relevant and, indeed, established that respondent commingled personal funds with the funds he was holding as trustee in the trust account and that respondent used funds from the trust account for purposes unrelated to the purpose for which the trust account was established. Such evidence was sufficient to establish a *prima facie* case of a violation of DR 9-102(A).

Bar Counsel's exhibits also demonstrated that respondent, at a hearing before the Auditor-Master, misstated his gross income for the year 1979. The transcript from the hearing before the Auditor-Master (Bar Ex. 10) showed that respondent stated under oath that in 1979 he grossed in excess of $150,000. Respondent's income

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[3] Respondent did object to the admission into evidence of Bar Exhibits 1-18 "as being irrelevant and in violation of the Fifth and Fourteenth Amendments to the Constitution." *See* "Respondent's Objection To Bar Exhibits," which was received by the Board on Professional Responsibility on January 19, 1982, three days before the January 22, 1982 hearing. At the hearing, respondent reiterated his objections to the admissibility of Bar Exhibits 1-18. The Committee sustained respondent's objection on grounds of relevance to Bar Exhibit 1. The Committee overruled respondent's objections to Bar Exhibits 2-18, and those exhibits were admitted into evidence. (Tr. 12-15; 21-24).

tax return for 1979 showed, however, that he grossed approximately $58,000. Thus, the exhibits presented in Bar Counsel's case in chief on this aspect were also both relevant and sufficient to establish a *prima facie* case under DR 1-102(A)(4).

In asserting that the Bar Counsel did not make out a *prima facie* case, respondent relies primarily on *In the Matter of Thorup*, 432 A.2d 1221 (D.C. App. 1981), where the court stated that "the burden of proof in attorney disciplinary proceedings is on the proponent." 432 A.2d at 1225 *citing Charlton* v. *Federal Trade Commission*, 177 U.S. App. D.C. 418, 543 F.2d 903 (1976). *In the Matter of Thorup, supra*, is clearly distinguishable from the instant case. There an attorney was accused of failing to adequately represent his client. The only evidence produced to support that charge was a docket sheet that showed only that the accused attorney had failed to file a motion to suppress, and that such a motion had subsequently been filed by successor counsel and granted by the trial court. The accused attorney was asked to explain his action, and was unable to do so to the satisfaction of the Hearing Committee. In finding the attorney in violation of the Code of Professional Responsibility, the Hearing Committee found the attorney's records and recollections insufficient, which the Court of Appeals held is "misconduct neither charged nor founded in the Disciplinary Rules." 432 A.2d 1225. The court refused to accept the Board on Professional Responsibility's argument that Bar Counsel had met its burden of proof by the introduction of the docket sheet. The court stated that it had repeatedly rejected "Monday morning quarterbacking" in ineffective assistance of counsel cases, and that a judgmental or tactical error revealed by later events or hindsight does not of itself establish a disciplinary violation. The court also rejected the Hearing

Committee's use of the attorney's testimony to modify the charges against him.

As discussed above, the exhibits introduced into evidence by Bar Counsel in the instant case demonstrated much more clearly a *prima facie* case that respondent violated the Code of Professional Responsibility. Moreover, Bar Counsel did not in the instant case rely on one piece of evidence, but rather on a large number of detailed and highly relevant exhibits that reflected respondent's conduct over a period of months.

II. *Respondent's Motion To Dismiss Based upon the Superior Court's Approval of the Auditor-Master's Report*

By order dated March 11, 1981, the Superior Court ratified the Auditor-Master's report dated February 12, 1981. (Bar Ex. 12) The Auditor-Master's report contained a recommendation that the court consider the advisability of referring the matter to the Office of Bar Counsel for appropriate action. (Bar Ex. 11, p. 6) In ratifying the Auditor-Master's report, the court did not refer the matter to Bar Counsel and made no reference to the Auditor-Master's recommendation of referral. Respondent contended in a written "Motion To Dismiss Petition Instituting Formal Disciplinary Proceedings" filed prior to the hearing and orally at the hearing (Tr. 16-18) that the Superior Court considered but did not accept the Auditor-Master's recommendation of referral. Respondent further contended that as the Superior Court has general equity powers in matters pertaining to trustees it appoints, the Superior Court's non-referral of the matter was final and conclusive, and, therefore, the Committee was precluded from determining whether respondent had violated any disciplinary rules. The Com-

mittee deferred decision on respondent's motion and requested that the parties brief the issues raised thereby in their post-hearing submissions. (Tr. 19-20)

Bar Counsel now contends that the court's ratification of the Auditor-Master's report actually constitutes a determination that respondent breached his duties as trustee. (Bar Counsel's Post-Hearing Brief, p. 5)

In our view, neither we nor the Board on Professional Responsibility is precluded from reviewing respondent's conduct because the court did not specifically refer the matter to the Office of Bar Counsel. The court, in ratifying the Auditor-Master's report, did not purport to make a determination whether respondent breached his fiduciary duty as trustee. The court's order is silent with regard to whether respondent's conduct warranted a referral to the Office of Bar Counsel, and no inference properly can or should be drawn from that silence. Thus, the court's action in this regard does not preclude this Committee from determining whether respondent's conduct was in violation of the Code of Professional Responsibility. Nor does the court's action constitute a determination that respondent breached his duties as trustee.

III. *Commingling and Misappropriation of Funds*

Respondent does not dispute that he commingled funds he was holding in a trust account with funds from unidentified sources, and that he used funds from the trust account for personal and business purposes. Respondent maintains, however, that his actions were not in violation of DR 9-102(A), as that rule proscribes a lawyer from commingling funds of a *client* with funds belonging to the lawyer.[4]

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[4] Bar Counsel has proceeded on the theory that "Respondent's misappropriation, conversion, and commingling of trust

The question with which we are presented, therefore, is whether the proscription of DR 9-102(A) applies only to circumstances where a traditional lawyer-client relationship exists. That appears to be a question of first impression in the District of Columbia. In a recent decision, however, the District of Columbia Court of Appeals implied that the Rule 9-102(A) proscription against commingling of funds applies whenever an attorney has a fiduciary obligation. In *In the Matter of Burka*, 423 A.2d 181 (D.C. App. 1980) [(en banc)], the court applied DR 9-102(A) where the court-appointed successor conservator of the estate of an adult ward made a series of unauthorized withdrawals totalling $41,000 from the estate checking account. The respondent conservator also made deposits in excess of $29,000 from unidentified sources into the estate checking account. After the respondent's removal as conservator the Auditor-Master found him accountable for $37,390.20, of which $11,661.00 was missing. Respondent subsequently made full restitution to the estate. The court affirmed the finding of the Hearing Committee and the Board on Professional Responsibility that respondent had violated DR 9-102(A) by his failure to keep all moneys from the ward's account deposited at all times in a separate identifiable bank account.[5] In holding that the respondent in *Burka* vio-

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funds violated Disciplinary Rule 9-102(A)." *See* Bar Counsel's Post-Hearing Brief, p. 4; *compare* Specification of Charges, ¶ 11 ("Respondent's unauthorized withdrawals from the trust account violated DR 9-102(A) because he failed to maintain the trust funds in an account of the type required by that disciplinary rule."). In other cases misappropriation (as distinct from commingling) has apparently been charged under DR 1-102(A)(4). *See, e.g., In the Matter of Burka*, 423 A.2d 181, 183, 186-87 (D.C. App. 1980) [(en banc)].

[5] The court also affirmed the finding of the Committee and the Board that respondent's unauthorized withdrawal of money

lated DR 9-102(A), the court implicitly recognized that funds of a fiduciary are encompassed in the definition of client funds. *See also In the Matter of Vogel*, 382 A.2d 275, 279-80 (D.C. App. 1978) [(per curiam)] (court adopted findings and recommendations of Disciplinary Board, which, in interpreting DR 1-102(A)(4), rejected notion "that a lawyer's responsibilities where funds of third parties are concerned should be treated differently from a lawyer's responsibilities in dealing with his client's funds").

Other jurisdictions which have considered the question have stated that DR 9-102(A) should be applied when an attorney abuses his or her fiduciary duty, even where a conventional lawyer-client relationship does not exist.

In *Simmons* v. *State Bar of California*, 70 Cal.2d 361, 450 P.2d 291, 74 Cal. Rptr. 915 (1969) [(per curiam)], the Supreme Court of California upheld the finding of a disciplinary board that an attorney had misappropriated funds.[6] The court noted that it was difficult to determine

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from the estate account constituted dishonesty and deceit in violation of DR 1-102(A)(4).

[6] The case was decided under Rule 9 of the California Rules of Professional Conduct, which provided:

> A member of the State Bar shall not commingle the money or other property of a client with his own; and he shall promptly report to the client the receipt by him of all money and other property belonging to such client. Unless the client otherwise directs in writing, he shall promptly deposit his client's funds in a bank or trust company, authorized to do business in the State of California, in a bank account separate from his own account and clearly designated as "Clients' Funds Account" or "Trust Funds Account" or words of similar import. * * * [Quoted in Simmons v. State Bar of California, *supra*, 450 P.2d at 293.]

whether the petitioner received the funds he misappropriated in his capacity as a real estate broker or in his capacity as an attorney. The court stated that even if petitioner was acting as a real estate broker at the time he received the funds, "having accepted the money in trust, [he] would still be held to the same high standard." 450 P.2d at 293. The court, quoting *Clark* v. *State Bar*, 39 Cal.2d 161, 166, 246 P.2d 1, 3 (1952) [(per curiam)] (where an attorney, acting as guardian of an incompetent's estate, was disciplined for mishandling funds), further stated that "[w]hen an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct." 450 P.2d at 294.

In *Johnstone* v. *State Bar*, 64 Cal.2d 153, 410 P.2d 617, 49 Cal. Rptr. 97 (1966) [(per curiam)], an attorney was disciplined under California Rule 9 for willful violation of a trust involving money of a third person not a client of the attorney. The California Supreme Court stated: "When an attorney receives money on behalf of a third party who is not his client, he nevertheless is a fiduciary as to such third party. Thus the funds in his possession are impressed with a trust, and his conversion of such funds is a breach of the trust." 410 P.2d at 618.

In *State* v. *Freeman*, 229 Kan. 639, 629 P.2d 716 (1981) [(per curiam)], the Kansas Supreme Court was faced with a case in which an attorney, acting as a trustee, had converted to his own use funds due the trust. The court stated:

> Although Sheila Hoffner [the beneficiary of the trust] was not Freeman's client, respondent's powers were to be used in a fiduciary capacity by the terms of the trust and we find his actions

> are as reprehensible as if he had been handling the money of a client, to whom he would owe the same fiduciary responsibility.

629 P.2d at 720. *See also In re Draper*, 317 A.2d 106 (Del. 1974 [(per curiam)] (court found violation of DR 9-102(A) where lawyer was holding funds as correspondent for another lawyer).

The facts presented to this Committee demonstrate that respondent breached his fiduciary obligation as trustee. Although no conventional attorney-client relationship existed, respondent owed a fiduciary obligation to both the Superior Court, which appointed him as trustee, and the beneficiaries of the trust account. The decisions cited above reflect the view, correctly in our opinion, that DR 9-102(A) should apply whenever an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client. Thus, we are persuaded that respondent's conduct in the instant case is within the scope of DR 9-102(A).[7]

In addition, in the instant case respondent's appointment as trustee by the Superior Court was presumably due in some measure to his reputation for integrity and competence. Respondent's conduct is clearly the type of behavior DR 9-102(A) was designed to deter with respect to client funds. Certainly respondent's obligations with respect to funds that came into his hands as a court-appointed trustee should be no less than his obligation with respect to funds of a client. To hold that DR 9-102

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[7] Our interpretation is further supported by the fact that Canon 11 of the Canons of Professional Ethics of the American Bar Association, an antecedent of DR 9-102, was applicable explicitly to client funds "or other trust property." *See* ABA Canon 11.

(A) does not apply in the instant case would make no sense and would, indeed, be inconsistent with the purpose of DR 9-102(A).

Respondent contends that his initial withdrawal of $3,300 from the trust account was inadvertent. In summary, respondent alleges that he asked his secretary to draw a check for $3,300 to pay the obligation of another client while he was out of the office, and his secretary drew the check on the wrong account. He further alleges that once he discovered the breached trust account, he initially considered replacing the funds he had withdrawn, but because of his busy schedule the matter escaped his attention. Subsequently, he decided to treat the account as a general checking account and made numerous deposits to and withdrawals from the account. He contends that his conduct in handling the trust account was appropriate because he personally had cash on hand at home to cover what was supposed to be in the account. (Respondent's Post Hearing Brief, pp. 3-4; Tr. pp. 52-54, 95-97)

Courts have held that it will not suffice to absolve an attorney of a charge of commingling that his "course of practice in this respect [was] the product of ignorance rather than design." *In re Makowski*, 73 N.J. 265, 374 A.2d 458, 461 (1977) [(per curiam)]. Thus, we need make no finding here as to whether respondent's initial breach of the trust account was intentional. We note, however, that on November 14, 1979, respondent's general client trust account (client account), on which respondent claims he intended to draw the $3,300 check, which was then certified, had a balance of only $1,564.14. (Bar Ex. 18) Thus, as Bar Counsel notes, respondent could not have obtained certification for a $3,300 check drawn on that account. (Bar Counsel's Post-Hearing Brief, pp. 12-13)

After discovering the initial breach, respondent failed to replace the money he had withdrawn. Although respondent's self-described hectic schedule conceivably could account for the initial breach and some delay in respondent's discovery of the breach, it does not explain respondent's failure to replace the withdrawn funds once he discovered the breach; nor does it explain or excuse respondent's subsequent conduct with respect to the trust account.

By respondent's own admission, after his discovery of the breach, he began a series of withdrawals from and deposits to the account. Respondent testified before the Auditor-Master that he wrote checks for his office rent and the office rent of his associates, for witness fees, for the automobile repair bills of his associates, for refunds of client fees, for his secretary's salary, for his debt to the Internal Revenue Service, for his law clerk's salary, and for other personal and business purposes unrelated to the trust. (Bar Ex. 10 at 16-32) Although respondent consistently deposited money from unidentified sources into the account, there were consistently shortages in the account for an almost 18-month period. (Bar Ex. 14)

We have therefore concluded that respondent's conduct in depositing personal funds and funds from unidentified sources into the trust account constituted a commingling of funds in violation of DR 9-102(A). Respondent's use of trust funds for purposes unrelated to the purpose of the trust constituted misappropriation of funds.[8] Bar

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[8] Misappropriation has been defined as

> any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.

In the Matter of Wilson, 81 N.J. 451, 409 A.2d 1153, 1155 n.1 (1979).

Counsel has charged that such misappropriation violated DR 9-102(A). *See* Specification of Charges, ¶ 11 (quoted in footnote 4, *supra*). Respondent appears to contend that DR 9-102(A) extends only to commingling. *See* Respondent's Post Hearing Brief, pp. 18-19. DR 9-102(A) requires that client funds paid to a lawyer "be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated . . . ." Unauthorized withdrawals are inconsistent with the requirement to deposit client funds in an identifiable bank account in the jurisdiction, unless the requirement to "deposit" is to be given only a formal meaning. DR 9-102(A)(2), which is cast in terms of an exception to DR 9-102(A), deals with the circumstances under which funds to which both lawyer and client have a claim may or may not be *withdrawn* from an account or accounts required by DR 9-102(A). This evidences the intention of the draftsmen to require that a deposit, once made in compliance with DR 9-102(A), be maintained—not only free from commingling but also in the bank—until such time as withdrawal is authorized. Such a construction seems consistent with the purpose of DR 9-102(A), which is to provide against the possible loss of clients' funds. *See Greenbaum* v. *State Bar*, 15 Cal. 3d 893, 544 P.2d 921, 126 Cal. Rptr. 785 (1976) [(per curiam)].[9] Accordingly, we have concluded that DR 9-102(A) was intended to prohibit unauthorized withdrawals of the sort charged here as well as commingling, and we have concluded that respondent violated DR 9-102(A) by making such unauthorized withdrawals as well as by commingling.

The Committee expressly rejects respondent's contention that in making unauthorized withdrawals he violated

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[9] *See also In re Broverman*, 40 Ill. 2d 302, 239 N.E.2d 816 (1968); *Ohio State Bar Association v. Gray*, 1 Ohio St. 2d 97, 204 N.E.2d 683 (1965) [(per curiam)].

no ethical proscription because he always "maintained sufficient funds to satisfy the requirement of the trust." (Respondent's Post Hearing Brief, p. 19) First, even if respondent did have sufficient cash on hand to cover the shortages, it would not excuse his breach of the trust or his unauthorized use of trust funds. Moreover, respondent has never demonstrated that he did in fact have access to replacement funds.

Finally, the Committee rejects respondent's claim that his breach of the trust was cured when he reimbursed the trust account. Restitution is not a defense to the charge of having misappropriated trust funds. *See In the Matter of Burka*, 423 A.2d 181 (D.C. App. 1980) [(en banc)]; *In the Matter of Quimby*, 123 U.S. App. D.C. 273, 359 F.2d 252 (1966) [(per curiam)]; *In the Matter of Wilson*, 81 N.J. 451, 409 A.2d 1153 (1979).

IV. *Misrepresentation to the Auditor-Master*

Bar Counsel contends that respondent's testimony under oath to the Auditor-Master that he grossed in excess of $150,000 constituted a misrepresentation in violation of DR 1-102(A)(4). Respondent's tax returns and his testimony before the Committee indicate respondent grossed $58,073 in 1979. Respondent argues that his testimony was inadvertent. He contends that he did not intend to indicate that his gross income exceeded $150,000, and that a review of the transcript will demonstrate that his statement concerning his gross income was taken out of context. (Respondent's Post Hearing Brief, p. 17)

The Committee has carefully reviewed the transcript of respondent's testimony before the Auditor-Master. We conclude that respondent knowingly misrepresented his gross income for 1979. In response to direct questioning as to what respondent did with the $150,000 he claimed

to have grossed in 1979, respondent testified that he put some of it into an account, bought stock with some of it, and deposited a portion of it in a personal checking account which he used to pay bills. (Bar Ex. 10 at 37-38) During the course of his testimony before the Auditor-Master, respondent had numerous opportunities to clarify any misunderstanding as to what the $150,000 figure referred to, and he consistently indicated it referred to his gross income.

There is no indication from respondent's testimony before the Auditor-Master that in describing his $150,000 gross income, respondent intended to include "all of the funds that come through my office," including "deferred income that's owed to me that I have not collected. . . ." (Tr. at 62) Respondent, as an experienced attorney, legitimately can be imputed with knowledge of the meaning of the term "gross income." We can only conclude that respondent intentionally misrepresented his gross income for the year 1979 to bolster his claim before the Auditor-Master that he was financially sound. In so doing, respondent violated DR 1-102(A)(4).

V. *Respondent's Character Witnesses*

The Committee has noted the testimony of the seven character witnesses called by respondent. The character witnesses, who included the Chief of Surgery at [D.C. General Hospital] (Dr. Lee), officials of the District of Columbia Superior Court (Messrs. Rucker and Duckenfield), a former client of respondent (Ms. Goodwine), a member of the District of Columbia Council (Mr. Moore), and members of the District of Columbia Bar (Messrs. Mitchell and O'Donnell), attested to respondent's high moral character, trustworthiness and integrity. They testified that respondent selflessly helped other

lawyers establish themselves in the profession by sharing his knowledge and experience and by helping young lawyers financially. Some of the character witnesses also testified that respondent had handled money for them with no resulting improprieties or difficulties.

We have given careful consideration to the testimony of the character witnesses. While we do not dispute the accuracy or veracity of the character witnesses' testimony, the testimony does not serve to contest or refute the essential facts at issue in respect of the charges involving commingling and unauthorized use of trust funds. With regard to the misrepresentation charge, the character witnesses' testimony relates to respondent's reputation for truthfulness, and respondent has testified that his misstatement was inadvertent and not intended to mislead. We have regretfully concluded, however, that the totality of the objective evidence is clear and convincing that respondent knowingly misrepresented his gross income at the hearing before the Auditor-Master in violation of DR 1-102(A)(4).

VI. *Summary*

For the reasons set forth above, the Committee finds that respondent's misappropriation and commingling of funds he was holding in a trust account as a court-appointed trustee constituted a violation of DR 9-102(A). We expressly reject respondent's contention that DR 9-102(A) should not apply in the instant case because of the absence of a conventional attorney-client relationship. We also conclude that respondent's testimony under oath before the Auditor-Master that his gross income was in excess of $150,000 in 1979 constituted "conduct involving . . . misrepresentation" in violation of DR 1-102(A)(4).

RECOMMENDED SANCTION

Bar Counsel states, "A simple commingling of funds or an isolated instance of misrepresentation probably warrants only a censure or a short suspension. [citation omitted.] Misappropriation of client's funds, though, is an egregious offense generally requiring disbarment." (Bar Counsel's Post-Hearing Brief, p. 15) Respondent contends that "this case does not present the elements of a case where disbarment is warranted," and that in light of the totality of the circumstances and the testimony of the character witnesses, "at most a reprimand would be in order." (Respondent's Post Hearing Brief, pp. 20-21)

Based upon the facts of this case, we have concluded that disbarment is the appropriate sanction. The Committee has reached this conclusion notwithstanding respondent's prior, 25-year record at the Bar. Courts in misappropriation cases have not regarded an attorney's prior record of ethical practice as a circumstance sufficient to permit a lesser sanction than disbarment. *See In the Matter of Burka*, 423 A.2d 181 (D.C. App. 1980) [(en banc)]; *In the Matter of Moore*, 110 Ariz. 312, 518 P.2d 562 (1974) [(en banc)]; *Bar Association of Baltimore City* v. *Marshall*, 269 Md. 510, 307 A.2d 677 (1973).

In the Matter of Quimby, 123 U.S. App. D.C. 273, 359 F.2d 257 (1966) [(per curiam)], a case decided by the United States Court of Appeals for the District of Columbia Circuit, is factually similar to the instant case. In *Quimby*, the court approved the disbarment of an attorney for misappropriating funds from the estates of two incompetent war veterans for whom he was the court-appointed conservator. After the Court Auditor noted the defalcation, the attorney returned all the withdrawn money with interest. In his defense, he stated that

he was under terrific mental pressure during the time he misappropriated the funds.

The court rejected the attorney's argument that his long record before the bar demonstrated his action was an "isolated aberration not likely to be repeated." 123 U.S. App. D.C. at 274. The court stated:

> The administration of justice under the adversary system rests on the premise that clients and the courts must be able to rely without question on the integrity of attorneys. An act against a client evidencing moral turpitude, even though attributable to some aberration or stress that would warrant the prosecutor in abstaining from criminal prosecution, may nevertheless warrant severe disciplinary action concerning an officer of the court.
>
> When a member of the bar is found to have betrayed his high trust by embezzling funds entrusted to him, disbarment should ordinarily follow as a matter of course. Such misconduct demonstrates absence of the basic qualities for membership in an honorable profession. Only the most stringent of extenuating circumstances would justify a lesser disciplinary action, such as suspension, which implies the likelihood that at some future time the court may again be willing to hold out the embezzler as an officer of the court worthy of clients' trust. The appearance of a tolerant attitude toward known embezzlers would give the public grave cause for concern and undermine public confidence in the integrity of the profession and of the legal system whose functioning depends upon lawyers. [*Id.* at 274]

In a more recent decision, *In the Matter of Burka*, 423 A.2d 181 (D.C. App. 1980) [(en banc)], the District of Columbia Court of Appeals ordered disbarment where an attorney was found to have violated DR 9-102(A) and (B) and DR 1-102(A)(4) and (5) for commingling funds from personal and unidentified sources with funds he was holding as the conservator of an estate and for making unauthorized withdrawals from the estate checking account.

In *In the Matter of Wilson*, 81 N.J. 451, 409 A.2d 1153 (1979), the Supreme Court of New Jersey explained the rationale behind the admittedly strict sanction of disbarment in misappropriation cases.

> [T]he principal reason for discipline is to preserve the confidence of the public in the integrity and trustworthiness of lawyers in general. This reason for discipline is mentioned in some misappropriation cases and not in others.
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> * * * *
>
> We have no doubt that the bar is as anxious as we are to preserve that trust. Its preservation is essential to public acceptance of reforms that may be proposed by the bench and bar together. Mistrust may provoke destructive change. Public confidence is the only foundation that will support constructive reform in the public interest while preserving the finest traditions of the profession.
>
> From that point of view, anything less than strict discipline in cases like this would be a disservice to the bar, the judiciary and the public.

409 A.2d at 1155. *See also In re Smock*, 86 N.J. 426, 432 A.2d 34 (1981) [(per curiam)].

In *Bar Association* [*of Baltimore City*] v. *Marshall*, 269 Md. 510, 307 A.2d 677 (1973), the court approved disbarment where an attorney misappropriated a client's funds. The court noted that the attorney-client relationship is based on trust and that it is important to both lawyers and society that there be no lessening of the public's confidence in the integrity, honesty and fidelity of the lega! profession. The court further noted that "misappropriation by an attorney of funds of others entrusted to his care . . . represents the greatest form of professional misconduct." 307 A.2d at 682. The court concluded by stating:

> [W]hen a member of the bar of this Court is found to have betrayed the high trust in him by appropriating to his own use funds of others entrusted to him, as Marshall did, then, absent the most extenuating circumstances, which we do not find to be present here, disbarment should follow as a matter of course. [*Id.*]

See also In the Matter of Moore, 110 Ariz., 312 518 P.2d 562 (1974) [(en banc)] (disbarment ordered where attorney withdrew client funds for personal use without approval or authorization); *State* v. *Barrett*, 207 Kan. 178, 483 P.2d 1106 (1971) [(per curiam)] (commingling, failure to fulfill trust obligations and false statement held to warrant disbarment).

Respondent's conduct—particularly misappropriating funds entrusted to him at the order of the Superior Court and misrepresenting gross income in testimony under oath before the Auditor-Master—constituted egregious breaches of his professional responsibilities. In light of the authorities cited above and Respondent's conduct as

found herein, the Committee recommends that Respondent be disbarred.

(End of quoted portion of Hearing Committee's Report)

CONCLUSION

Sanctions imposed in commingling cases have varied from censure by the Court (*In re Artis*, DCCA No. M-103-81, decided February 25, 1982) to disbarment (*In re Burka, supra*). This Board has had occasion to pass upon five separate cases involving commingling of funds within the last few months (including this one) and all of them are now pending, or will forthwith be pending for review by the Court of Appeals.

As we pointed out in one of these cases (*In re Hines*, Nos. 194-80 and 447-79, decided November 10, 1982) commingling cases fall into a number of patterns. There is the case of an attorney commingling a client's funds in a bank account with his own money when the account is always adequate to cover the escrow. This is a violation of DR 9-102(A), but the client's money is never in jeopardy. There are also many variations of situations in which the client's and personal funds are commingled and the bank account is allowed to dip below the amount required to satisfy the escrow. At times the evidence seems to indicate only simple negligence on the part of the attorney. In other cases, the evidence indicates deliberate misappropriation of the client's money by the attorney, in violation of [DR 1-102(A)(4)]. At times the commingling is also accompanied by false and misleading statements from the attorney to the client. In the case at bar false and misleading statements were made to the Auditor-Master.

In the Matter of Harrison, decided July 20, 1982, the Board found, as in *Hines*, commingling and misappropriation due to sloppiness and recklessness in the handling of the client's funds, together with a lack of candor in dealing with the client. There we have recommended suspension for a year and a day.[1]

In the Matter of Cefaratti, decided November 5, 1982, the attorney had limited authority to invest his client's escrowed funds. He "invested" some of them by lending the funds to himself at a rate of interest below that normally charged, without any documentary evidence to support the loan and without the consent of the client. In that case we have also recommended sanction of a year and a day.[2]

In *Hines*, *supra*, we found that Respondent's conduct involved more than simple negligence but did not rise to the level of corruption. There Respondent showed a reckless disregard of the state of the bank account into which he deposited his client's funds and kept no running balance of this account, which at times was insufficient to cover the client's escrow. We concluded there that this reckless conduct gave rise to a presumption that there was an intent on Respondent's part to deal with and use the escrow funds as his own, and recommended in that case a sanction of two years.

In the Matter of McLean, also decided today, the attorney had been engaged in a long-time pattern of commingling clients' funds, which were chiefly those received in settlement of negligence or workmen's compen-

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[1 This court adopted the Board's recommendation. *In re Harrison*, 461 A.2d 1034 (D.C. 1983).]

[2 The recommendation was adopted. *In re Cefaratti*, No. M-140-82, June 28, 1983.]

sation cases. The commingled funds were used for business and personal purposes, and the balance in the account was often insufficient to protect the clients. The commingling was accompanied by dishonesty and deceit in dealing with clients. The attorney falsely stated to the clients from time to time that settlement monies had not been received when in fact they had. The attorney was also found to have falsified records submitted to Bar Counsel. Here we have recommended disbarment.[3]

In the instant case, as in McLean, we recommend that Respondent be disbarred. Not only was there gross commingling of trust funds over a substantial period of time with periodic extreme shortages in the account, but Respondent was guilty of inexcusable falsehood in testifying before the Auditor-Master who was auditing Respondent's account. The cases of *Quimby* and *Burka*, *supra*, cited by the Hearing Committee support our conclusion.

BOARD ON PROFESSIONAL RESPONSIBILITY

By /s/ Edmund D. Campbell
EDMUND D. CAMPBELL

All members of the Board concur.

Dated: November 29, 1982

[3 The recommendation was adopted. In re McLean, No. M-142-82, April 11, 1983.]

BOARD ON PROFESSIONAL RESPONSIBILITY
DISTRICT OF COLUMBIA COURT OF APPEALS

Bar Docket Nos.: 224-79
245-81

IN THE MATTER OF MELVIN M. BURTON, JR.

REPORT AND RECOMMENDATION

This matter is before the Board based upon the Report and Recommendation of Hearing Committee Number Two, dated January 24, 1983, which concluded that Respondent had violated Disciplinary Rules 9-103 (commingling client and attorney funds) and 1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation) by deliberately misappropriating certain funds which Respondent was holding for others in his "trust account." * The hearing committee recommended that Respondent should be suspended from the practice of law for four years based upon these violations. As discussed in sections I and II, below, we agree that Respondent is guilty of knowing misappropriation of funds, in violation of the disciplinary rules charged. For the reasons set forth in section III, below, we reject the various procedural arguments raised by Respondent. Finally, as discussed in section IV, we conclude that the facts of this case and the applicable law require that Respondent should be disbarred.

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* The hearing committee concluded that the separate charges in Count II of Bar Counsel's petition, arising out of an unrelated set of facts, were not supported by clear and convincing evidence and should be dismissed. The hearing committee's findings of fact on those separate charges are supported by substantial evidence on the record as a whole, and we dismiss the charges in Count II for the reasons set forth in the hearing committee's opinion.

I. *Facts*

Respondent was retained by the Veterans' Administration ("VA") to institute foreclosure proceedings based upon the default by a Mr. and Mrs. Pailin on a VA loan secured by a real estate deed of trust. The property was sold at a foreclosure sale in June 1978 for $28,000. Bar Counsel's evidence established that Respondent was retained to handle the foreclosure sale, to remand to the VA the amount owing to it on the outstanding loan (approximately $17,000), and to pay the excess to the Pailins after deducting Respondent's fees and any other legitimate expenses associated with the foreclosure sale. *See* Tr. 26-39.

In order to support his charge that Respondent had misappropriated funds, Bar Counsel relied primarily on certain bank records which were introduced into evidence before the hearing committee. The committee reviewed those records in detail and made the following findings:

> Those records disclose that Respondent received a check from the settlement company, District Realty Title Insurance Corporation, in the amount of $26,378.16 as the net proceeds of the foreclosure sale [BX 7]. Thereafter, on July 16, 1978, Respondent deposited the check (less a deduction of $1,505.90 not here in question) into a "trust account" bearing the number 3-045-80-3 at the National Bank of Washington [BX 9b]. After allowing for other expenses not here in question, Respondent expressly acknowledged that he was accountable to the Veterans' Administration for $16,639.68 and to the Pailins for $7,256.10 [BX 13], or an aggregate amount of $23,895.78.
>
> On July 18, 1978, Respondent wrote a check, number 3856, on the trust account for $1,000

[BX 9]. This check was made payable to a third party, neither the VA nor the Pailins, and the check caused the remaining balance in the trust account to be reduced to $23,744.11, which was a sum less than the total amount payable to the VA and the Pailins [BX 9 and 9w]. Thereafter, Respondent made other withdrawals from the trust account, by means of checks payable neither to the VA nor the Pailins, so that on July 26, 1978, the remaining balance in the trust account was $19,969.66 [BX 9 through 9gg].

Thereafter, on July 27, 1978, Respondent paid the Veterans' Administration $16,639.68 [BX 12], which represented the full amount due to the VA on the mortgage. This payment was made by a check bearing the number 3863, written on the above trust account, whereupon the remaining balance in the trust account at the National Bank of Washington was $2,929.28 [BX 10]. Yet, according to Respondent's own accounting, Respondent was then accountable to the Pailins for $7,256.10 [BX 13].

Moreover, by late November 1978, numerous other withdrawals reduced the balance in the trust account to $10.10 [BX 11c]. At that time, Respondent was still accountable to both Mr. and Mrs. Pailin for $7,256.10 [BX 13].

In November 1979, Ms. Pailin was paid her share of the proceeds, in the amount of $3,628.05 [BX 13]. This payment was made by Respondent by means of a check drawn on a different bank account, not the trust account number 3-045-80-3 at the National Bank of Washington.

There is no evidence in the record that Mr. Pailin has ever been paid his share of the proceeds.

The Committee finds that the financial records subpoenaed from the bank are clear and convincing evidence of the following: (1) that the full amount of the proceeds from the foreclosure sale was deposited into a particular trust account in the National Bank of Washington; (2) that a check of July 18, 1978 for $1,000 reduced the balance in the trust account to an amount less than the total amount then payable to the VA and the Pailins; (3) that the VA was paid in full on July 27, 1978, leaving the trust account with a balance inadequate to cover the amount payable to the Pailins; and (4) that Respondent, by means of numerous other withdrawals from that account, reduced the net balance in the trust account to an amount far below the amount that was due and payable to the Pailins.

The Committee concludes, on the basis of these bank records, that Respondent misused or misappropriated funds which Respondent was holding in trust. Moreover, in light of the numerous checks written on the trust account, which at one point reduced the account to a balance of $10.10 [BX 9, 11, 11a, 11b, 11c, and 11d] when the amount payable from the account was over $23,000, there is no basis for concluding that Respondent's conduct was inadvertent or due merely to "sloppy" administration.

II. *Discussion*

During the hearing committee proceedings, Respondent presented no evidence tending to contradict the factual

findings set forth above. Respondent did not call any witnesses or introduce any exhibits on these issues. Respondent did call a number of "character witnesses" who testified regarding Respondent's reputation, accomplishments, and standing at the Bar. When Bar Counsel attempted to call Respondent as a witness in Bar Counsel's case, Respondent invoked his Fifth Amendment privilege against self-incrimination. *See* Tr. 40-43. Respondent's principal objection argued before this Board * is that Bar Counsel failed to prove his case by clear and convincing evidence, leaving many questions unanswered, and effectively shifted the burden to Respondent to prove his innocence. There is no basis for Respondent's arguments.

As indicated above, the Hearing Committee concluded that Bar Counsel did prove by clear and convincing evidence that Respondent placed a sum of money in his client's trust account and failed to maintain that money in the account for payment to the intended beneficiaries. Bar Counsel introduced into evidence bank records demonstrating that approximately thirty separate checks were written by Respondent against this account during the period in question, and that this resulted in the account balance dipping as low as $10.10, at a time when Respondent was obligated to be maintaining thousands of dollars in that account for the benefit of others. *See* Bar Exhibits 9-11d, 13. There certainly was "substantial evidence on the record as a whole" to support the hearing committee's factual findings, and we accordingly affirm them. *See In re Smith*, 403 A.2d 296, 302 (D.C. 1979).

The evidence presented to the hearing committee clearly made out a *prima facie* case of commingling and misappropriation. While it is true, as Respondent argues,

* Respondent and Bar Counsel each submitted briefs to this Board but waived any right to present oral argument.

that Bar Counsel failed to offer proof concerning precisely how Respondent spent the money he was obligated to hold in the trust account,* such information, though potentially relevant, is hardly a necessary predicate to a misappropriation charge. *See Attorney Grievance Commission v. Boehm*, 293 Md. 476, 479-81 [446 A.2d 52, 54] (1982) (Where attorney places auction sale proceeds into escrow account, and bank records reflect withdrawals for unspecified purposes in greater amount than total of proper estate disbursements, court "cannot conceive of any clearer or more convincing evidence of [attorneys] misappropriation of . . . funds than that supplied by the escrow account, bank records, and [the attorney's] failure to explain exactly how these funds were used.")

Respondent's brief to this Board argues heatedly that the hearing committee erred in concluding that there was a knowing misappropriation of funds, because there was no evidence that Respondent knew *in 1978* how much money he was required to hold for distribution to the VA and to the Pailins. Respondent emphasizes that the statement of account which he prepared, and which was relied upon by the hearing committee, was written in 1979, and Respondent emphasizes that in 1978 it was not possible to know with precision the amount of fees and expenses that would be incurred in the matter. This argument is far wide of the mark.

Respondent's 1979 statement of account, Bar Exhibit 13, makes clear that the fees and expenses in connection with this matter equally approximately $2,500, and that

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* Many of Respondent's checks, which were offered into evidence, were either illegible or were written to payees unknown to Bar Counsel and to the representative of the Veterans Administration who testified. Respondent did not present to the hearing committee any evidence or arguments concerning the nature of these checks he wrote against his trust account.

the balance due to the Pailins, after subtracting such expenses and the share paid to the VA, was over $7,000. While it is true that in 1978 Respondent might not have been able to predict precisely the total expenses and fees to be incurred, that is irrelevant to this case as a matter of law. Respondent was obligated to maintain in the trust account any funds that had not yet been properly disbursed; any uncertainty as to future expenses would be legally irrelevant to Respondent's duty to maintain the funds in the account until and unless such expenses in fact were incurred. Bar Exhibit 13 represents Respondent's own admission that only $2,500 in expenses were ever incurred, and thus Respondent cannot now argue that a greater amount of expenses was properly disbursed from the account in 1978. Moreover, Respondent's argument (unsupported by any evidence in the record) that the lack of certainty regarding future fees and expenses might explain Respondent's allowing the balance of his account to fall to $10.10 (when more than $7,000 was due and owing) is totally lacking in credibility.

The hearing committee in this case appropriately allowed Respondent to exercise his Fifth Amendment right not to testify,* and the committee made it clear that it was drawing no "adverse inference based on Respondent's failure to testify . . . [or his] invoking his Fifth

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* The Fifth Amendment privilege is not available as a shield solely against Bar disciplinary proceedings, but can be invoked where testimony in such proceedings might lead to criminal prosecution. *See In re Thorup*, No. M-48-80 slip op. at 2 (D.C. February 25, 1983); *In re Anonymous*, Bar Docket No. 48-81, slip op. at 6-10 (Bd. Prof. Resp., Nov. 3, 1981), and cases cited therein. The hearing committee appropriately credited Respondent's counsel's representation that such consequences could flow from testimony concerning the matters at issue here. *See* Tr. 40-43.

Amendment privilege against self-incrimination when Respondent was called as a witness by Bar Counsel." *See* Hearing Committee Report at p. 13. There is simply no basis for Respondent's arguments that the hearing committee effectively placed the burden of proof on him in this matter. Once Bar Counsel had presented a *prima facie* case, Respondent was free to present any evidence or arguments he wished. While Respondent was not obligated to present any defense, neither was Bar Counsel obligated—as Respondent now suggests—to rebut all conceivable defenses and arguments that Respondent theoretically might have made, but in fact did not present, to the hearing committee.

Thus, Respondent essentially argues that Bar Counsel should have proven that Respondent did not have available to him certain defenses and arguments in mitigation that have proven significant to the Board in prior commingling cases. *See, e.g. In re Harrison*, Bar Docket No. 262-79, slip op. at 20 (Bd. on Prof. Resp., July 20, 1982), [*aff'd*, 461 A.2d 1034 (D.C. 1983)]; *In re Hines*, Bar Docket Nos. 194-80 and 447-79, slip op. at 3 (Bd. on Prof. Resp. October 28, 1982). The fact is, however, that Bar Counsel did prove commingling and misappropriation and that Respondent failed to present any evidence whatever of any defense or matter in mitigation regarding this offense. We hold that invocation of the Fifth Amendment does not allow a respondent to place the burden of proof on Bar Counsel to [disprove] affirmative defenses which respondent does not raise.

III. *Respondent's Motions and Legal Objections.*

Respondent presented to the hearing committee a large number of motions and objections to hearing committee procedures and rulings. The Board affirms the hearing committee's rulings on these matters, which were set

forth in its Pre-Hearing Order Number One, dated October 20, 1982, and in the Hearing Committee's January 24, 1983, Report and Recommendation. We adopt and incorporate herein the hearing committee's rulings on these points, and will merely add a few words on some of the issues that Respondent presses before us.

First, Respondent argues at length that Bar Counsel's subpoena for Respondent's bank records failed to comply with the procedural requirements of the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422, as interpreted in a July 8, 1982, District Court decision in *John Doe* v. *Board on Professional Responsibility*, D.D.C., C.A. No. 81-2683 [July 8, 1982]. We agree with the hearing committee's holding that there is no basis for an "exclusionary rule" prohibiting the introduction into evidence of these bank records, even assuming *arguendo* that Bar Counsel had failed to comply with applicable procedural requirements of the Act. We must emphasize, however, that the District Court decision in question was vacated upon reconsideration on February 3, 1983, and the District Court's most recent decision on this point holds that the District of Columbia Court of Appeals and its Board on Professional Responsibility are not agencies of the federal government subject to the terms of the Right to Financial Privacy Act.[1]

Second, Respondent argues that he was deprived of due process by the hearing committee's refusal to allow a "voir dire" of the hearing committee members before Respondent decided whether to seek recusal of any hear-

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[1 The district court's February 3 decision vacating the order of July 8, 1982, was affirmed on the issue of the Right to Financial Privacy Act. *Doe v. Board on Professional Responsibility of the D. C. Court of Appeals*, —— U.S. App. D.C. ——, 717 F.2d 1424, 1427 (1983) (per curiam)].

ing committee members pursuant to Chapter VIII, Section 3(1)(c) of the Internal Rules of this Board. There is no general right to a "voir dire" of hearing committee members—who serve this Board, and the Court of Appeals, in a quasi-judicial capacity—any more than there is any such right before a party files a motion to recuse a trial judge about to hear his or her case. Moreover when the hearing committee chairman asked Respondent what issues or questions he would raise in a voir dire, if allowed to conduct one, the matters set forth by Respondent made it clear that he had no particular factual basis for a challenge to any hearing committee member or for a voir dire on any specific area of inquiry. *See* Tr. 3-4

Third, Respondent argues to this Board that he was deprived of due process because Bar Counsel submitted certain proposed documentary exhibits to the hearing committee in advance of the hearing. Respondent neglects to note that the procedural rule in question allows both Bar Counsel *and* Respondent to submit their documentary evidence to the hearing committee in advance of the hearing date. *See* Chapter VIII, Section 1(4), Internal Rules of the Board on Professional Responsibility. The purpose of this rule, of course, is to allow the parties to exchange exhibits in advance of the hearing so as to determine whether there are any objections as to admissibility of particular exhibits, and also to allow the hearing committee members to begin reviewing the frequently voluminous record in advance of the hearing date. This procedure is quite similar to the practice in many courts which require the submission of pre-trial briefs and proposed exhibits in advance of the trial so as to expedite proceedings. Respondent's constitutional challenge to the Board rule allowing advance submission of proposed exhibits is frivolous.

Finally, Respondent argues that the charges at issue here should be dismissed because the petition in this matter was the result of Bar Counsel's improperly "reopening" a matter which had previously been the subject of inquiry. The record in this matter reveals that Docket No. 224-79 was initially based upon a rather vague, handwritten complaint filed by Ms. Loreta Pailin. Respondent answered this complaint on December 15, 1979, and the complainant failed to respond to the explanation furnished by Mr. Burton. Nothing in the complaint or in Mr. Burton's response suggested any commingling of funds, and Bar Counsel on February 1, 1980, dismissed Ms. Pailin's complaint. However, on March 1, 1982, Bar Counsel wrote to Mr. Burton and indicated that he was "reopening" this investigation, because "recent information concerning this case indicates that you misappropriated and converted the funds you were holding in your client trust account on behalf of Mr. Nathaniel Pailin and Ms. Loreta Pailin." Respondent was offered an opportunity to answer this additional charge, and subsequently Bar Counsel filed the formal petition leading to these proceedings. Under Court rules Bar Counsel is obligated to investigate allegations of unethical conduct which come to his attention, via complaint or otherwise. Rule XI, § 6(1)(b), D.C. App. Rules. Consequently, Bar Counsel was free unilaterally to open a new investigation of Respondent based upon new information suggesting commingling. Simply because Bar Counsel chose to term this a "reopening" of a previously docketed and closed case does not result in any prejudice to Respondent. Bar Counsel's "closing" of an investigation without filing a formal petition or initiating hearings of any kind hardly constitutes an action to which the doctrine of *res judicata* may be applied, nor does it provide a basis for Respond-

ent's argument that he can never be charged with disciplinary violations which could have been, but were not, spelled out in a citizen's complaint.

IV. *Sanction*

An attorney's misappropriation of funds entrusted to him is widely recognized as one of the most serious forms of professional misconduct. *Attorney Grievance Commission v. Pattison*, [292 Md. 599,] 441 A.2d 328 (Md. 1982); *Office of Disciplinary Counsel v. Lewis*, [493 Pa. 519,] 426 A.2d 1138 (Pa. 1981); *In re Davis*, [129 Ariz. 1,] 628 P.2d 38 (Ariz. 1981) [(en banc)]; *Florida Bar v. Merritt*, 394 So.2d 1018 (Fla. 1981) [(per curiam)]. It strikes at the heart of the relationship of trust and confidence that is so necessary between attorney and client, and it reveals a lack of the integrity which is a fundamental requirement in order to be qualified to practice law. *See generally In re Quimby*, [123 U.S. App. D.C. 273, 274,] 359 F.2d 257, 258 (D.C. Cir. 1966) [(per curiam)]:

> The administration of justice under the adversary system rests on the premise that clients and the courts must be able to rely without question on the integrity of attorneys. An act against a client evidencing moral turpitude, even though attributable to some aberration or stress that would warrant the prosecutor in abstaining from criminal prosecution, may nevertheless warrant severe disciplinary action concerning an officer of the court.
>
> When a member of the bar is found to have betrayed his high trust by embezzling funds

entrusted to him, disbarment should ordinarily follow as a matter of course. Such misconduct demonstrates absence of the basic qualities for membership in an honorable profession. Only the most stringent of extenuating circumstances would justify a lesser disciplinary action, such as suspension, which implies the likelihood that at some future time the court may again be willing to hold out the embezzler as an officer of the court worthy of clients' trust. The appearance of a tolerant attitude toward known embezzlers would give the public grave cause for concern and undermine public confidence in the integrity of the profession and of the legal system whose functioning depends upon lawyers.

Thus, a review of the cases demonstrates that disbarment is the normal sanction for commingling that involves knowing misappropriation of funds. *In re McClellen*, No. M-51-80 (D.C. March 26, 1981); *In re Burka*, 423 A.2d 181 (D.C. 1980) [(en banc)]; *In re Newsome*, No. D-34-79 (D.C. November 21, 1979).

While this Board has held that a lesser sanction might be appropriate if Respondent demonstrates that the misappropriation was inadvertent (*e.g.*, due to sloppy bookkeeping practices rather than an intention to convert client funds. *See In re Hines, supra*; *In re Harrison, supra*) there is no basis in this record to conclude that any such factors in mitigation exist. *See* pp. 5-8, *supra*. Thus, we conclude that the findings in this case of commingling and knowing misappropriation, absent any mitigating factors,* require Respondent's disbarment.

* Respondent presented substantial "character testimony" demonstrating his professional accomplishments, reputation

Our conclusion on this point would be the same even if Respondent had no prior disciplinary record. *See generally In re Burka*, 423 A.2d 181 (D.C. 1980) [(en banc)]. However, our view is buttressed by the fact (not available to the hearing committee at the time of its decision) that Respondent recently has been found by this Board to have been guilty of misappropriation of client funds in another matter. In *In re Burton*, Bar Docket No. 323-80 (Bd. Prof. Resp. November 29, 1982), this Board found that Respondent misappropriated for his own personal and business use more than $10,000 in funds that he was holding as a court-appointed trustee,* and that Respondent made a false statement under oath to the Auditor-Master in connection with an investigation of that matter. We recommended to the Court of Appeals that Mr. Burton should be disbarred for those offenses, and that recommendation is currently pending before the Court.

Since we now find that Respondent has committed yet another misappropriation of funds entrusted to him, we believe that the public interest in preserving the integrity of the Bar requires that we recommend once again that Respondent be disbarred.

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and standing at the Bar. While such testimony is of course entitled to weight in considering disciplinary sanctions generally, we believe that where the facts demonstrate *knowing* misappropriation of funds, no amount of character testimony or proof of a prior unblemished record at the Bar will normally call for a departure from the sanction of disbarment for such an egregious offense. *See generally In re Burka*, 423 A.2d 181 (D.C. 1980) [(en banc)] (disbarment ordered for misappropriation where Respondent had no prior disciplinary record and where extensive evidence was submitted to the Board regarding Respondent's achievements and good character).

* The trust account at issue in that case was not the same account as that involved here.

BOARD ON PROFESSIONAL RESPONSIBILITY

By /s/ Allen R. Snyder
ALLEN R. SNYDER
Chairman

April 26, 1983

Date

All members of the Board except Mr. Wilson participated in the consideration and decision of the matter.

DISTRICT OF COLUMBIA COURT OF APPEALS

IN THE MATTER OF

MELVIN M. BURTON, JR. Nos. M-143-82, 83-192

RESPONDENT

A MEMBER OF THE BAR OF
THE DISTRICT OF COLUMBIA
COURT OF APPEALS

PETITION FOR HEARING EN BANC

Comes now the Respondent, Melvin M. Burton, Jr., by and through his Attorney, Charles A. Brady, pursuant to Rule 40 of this Court and in support of his Petition for Hearing *En Banc* asserts as follows:

1. That the Respondent's Brief, Reply Brief and oral argument by his counsel before this Court on December 15, 1983, raised substantial substantive due process issues which were not addressed by this Court in its disposition of his case on January 11, 1984.

Manifold due process issues were raised which were left unresolved by the Court in reaching its decision to disbar the Respondent and unless these substantive due process issues are examined, and given pertinent and manifest application, the Respondent will have been bereft and divested of his status as a lawyer and his livelihood in two proceedings under the color of law but devoid of the legal safeguards of due process. A Rule of law which undergirds our Constitution which has been held and affirmed time and time again in an unbroken succession of cases is that one has a property right in the right to earn a livelihood and divestment of such right without due process contravenes both the law and the spirit of the law.

2. *The due process issues raised by the Respondent were numerous, the most of salient being:*

(A). IT WAS A VIOLATION OF THE RESPONDENT'S DUE PROCESS RIGHTS FOR BAR COUNSEL TO CHARGE THE RESPONDENT WITH COMMINGLING UPON WHICH CHARGE THE RESPONDENT DEFENDED, AND THEN RELY UPON MISAPPROPRIATION IN HIS POST HEARING BRIEF TO

Bar Counsel charged the Respondent with a violation of Disciplinary Rule 9-102(A) which provides as follows:

DR 9-102 — Preserving Identify of Funds and Property of a Client.

A. All funds of clients, paid to a lawyer or law firm, other than advances for costs and expenses shall be deposited in one or more identifiable bank accounts, maintained in the State in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein...

In proof of his case, Bar Counsel neither called nor presented witnesses with respect to the charge but relied upon the Exhibits which were Bank Statements and Cancelled Checks of the Respondent, admitted in evidence over the objection of the Respondent.

In his opening statement, Bar Counsel stated that "Respondent's unauthorized withdrawal from the trust account for purposes and uses totally unrelated to the trust violated Disciplinary Rule 9-102 A, *because he failed to maintain the trust proceeds in a trust account as required by that disciplinary rule.*" (Transcript in Bar Docket No. 323-80, dated January 22, 1982),

At the conclusion of the Hearing, the Chairman in

addressing himself to Bar Counsel, stated, "As I understand it, one of the disciplinary rules which Bar Counsel contends has been violated here is Disciplinary Rule 9-102, which is styled, preserving *identify of funds and property of a client*, is that correct?"

Bar Counsel Answered, "That's correct" (Transcript in Bar Docket No. 323-80, dated January 26, 1982).

Despite reliance upon and defense of the charge of Commingling by the Respondent, after close of the hearing, Bar Counsel in his Post Hearing Brief informed the Hearing Committee and the Board for the first time that it has proceeded on the theory that "Respondent's Misappropriation, conversion and commingling of trust funds violated Disciplinary Rule 9-102(A)." (See Bar Counsel's Post Hearing Brief, pg. 4).

In other cases, misappropriation as distinct from commingling has been charged under DR-1-102(A)(4). See, e.g., *In the Matter of Burka*, 423 A 2d 181, 183, 186-187 (D.C. App. 1980) (*en banc*).

The Court herein by its adoption of the findings of the Board on Professional Responsibility has fostered a new concept which allows Bar Counsel to raise Post Hearing, the level of a charge against a Respondent which has not been charged and against which charge the Respondent had no opportunity to defend. Further, the Court's findings allow the Board to apply a standard or add an element of no proof in a case which is not applicable to the stated charge, so that in this instance, the standard of misappropriation was applied to commingling.

The application by the Board of a standard which is not applicable to the charge inures to the prejudice and detriment of Respondent and is violative of his due process rights and equal protection of the law, in that, a Respondent has the right to know what he is charged with and to rely upon his defense to that charge.

This Court therefore should consider this question *en banc* to determine whether the aforesaid practice to Bar Counsel is consistent with the rudiments of due process required by the Bar Rules.

(B) THERE IS A DISPROPORTIONALITY IN THE IMPOSITION OF SANCTIONS METED OUT BY THE BOARD ON PROFESSIONAL RESPONSIBILITY TO BLACK RESPONDENTS VIS A VIS WHITE RESPONDENTS IN THIS JURISDICTION.

In the case at bar, the Court has by its adoption of the findings of the Board on Professional Responsibility allowed a disproportionate sanction upon a Black Attorney who has been charged with the similar misconduct as White Attorneys who have received a lesser sanction.

Except for the cases of *In the Matter of Quimby*, 123 U.S. App. D.C. 273,359 F.2d 257 (1966), in which this Board did not participate; the case of *In the Matter of Burka*, 423 A 2d 181 (D.C. App. 1980) (*enbanc*) where the Respondent was charged with and found to have violated DR 9-102(A) and (B) and DR 1-102(A)(4) and (5), where funds were withdrawn from an Conservatorship Estate Account and *In Re McLean*, No. M 142-82, April 11, 1983, where the Respondent misappropriated funds from negligence and workmen's compensation cases, all other White Attorney charged with similar conduct as the Respondent have received lesser sanctions. See *In Re Cefarratti*, No. M 140-82, June 28, 1983; *In Re Hines*, Nos. 194-80 and 447-79, decided November 10, 1982; and *In Re Harrison*, 461 A 2d 1034 (D.C. 1983).

It is particularly noticeable that the Respondents in the aforesaid matters, where all the Respondents were white received lesser sanctions and should be contrasted with the Respondent herein, who is a Black Attorney. (In The Case

of *In Re Newsome*, No. D 34-79 (D.C. November 21, 1979) who is black, disbarment arose because of a conviction in the United States District Court involving funds from a negligence case).

Moreover, in light of this Court's opinion in *In Re Harrison*, supra, where it announced a definition for misappropriation *for the first time* in this *jurisdiction* it would appear that along with the disproportionate sanction imposed upon a Black Attorney that the Court has applied its definition of misappropriation retroactively to apply to *pre-Harrison* conduct which was not so clearly defined at the time of the occurrence.

The Court should therefore also consider whether the application of the Harrison pronouncement standard was disparagingly imposed upon the Respondent because he is Black.

Given the well established climate of discrimination that exist today, due process is often the only protection a Black Attorney has from arbitrary procedures. The effect of this Court's ratification of the Board's violation of the Respondent's due process right would be a clear signal to the Black Bar that it should not expert its institutional right to be considered in proceedings of this nature.

(C). BAR COUNSEL, MAY NOT, WHERE HE HAS KNOWLEDGE OF TWO (2) ALLEGED VIOLATIONS, WHERE EACH AROSE THROUGH A SINGLE TRANSACTION AND ARE INTERTWINED WITH EACH OTHER, BIFURCATE THE VIOLATIONS AND MAKE THEM THE SUBJECT OF TWO (2) SEPARATE CASES.

As a result investigation in the matter of Burton/Anderson, D.C. Court of Appeal No. 143-82, Bar Counsel learned of a possible alleged violation in the Burton/Pailin matter,

Court of Appeal No. 83-492. Bar Counsel learned that Mrs. Pailin had been paid that Mr. Pailin had not received payment, which nonreceipt of payment by Mr. Pailin arose from the inability of the Respondent, to locate him after diligent effort had been made.

Notwithstanding these facts, the Burton/Anderson matter was petitioned, the Burton/Pailin matter was held in abeyance.

The Board on Professional Responsibility in the Burton/Anderson matter recommended the sanction of disbarment.

While this matter was pending before the Court, in Apeal No. M 143-82, the Burton/Pailin matter was petitioned as a second and separate case, which case resulted in a sanction of a four years suspension but was increased by the Board to that of disbarment.

This Court in affirming the conduct of Bar Counsel and the Board when it increased the sanction in the Burton/Pailin matter to that of disbarment, has stamped the approval of Bar Counsel to pick and choose among the charges on which to proceed when the effect of doing so would require as did here, the Respondent to offer testimony as to the alleged occurrence not petitioned.

The Respondent was prejudice in his defense and thrust in that posture because Bar Counsel was aware that the Respondent could not defend either charge in separate petitions without offering testimony as to the other. Further, Bar Counsel knew that because of the testimony offered by the Respondent to the petition not changed, the testimony would have a compelling effect upon any recommendation made. The effect of such a recommendation would be to take advantage in an unfair manner of the Respondent's inability to fully defend the alleged charge not petitioned.

Further, by its findings, the Court has given sanction to the ability of Bar Counsel to selectively choose which matter to petition and to elicit through cross-examination additional facts pertaining to the petition not charged for later

use when filing the second petition.

This Court should examine whether the requirement to afford the Respondent the rudiments of due process is outweighted by the Board's interest to protect the public interest.

(D). THE DENIAL OF THE RIGHT TO A "*VOIR DIRE*" OF THE HEARING COMMITTEE WAS IN VIOLATION OF THE BAR RULE PROVIDING FOR *VOIR DIRE* AND A DENIAL OF DUE PROCESS OF THE RESPONDENT

By the Court's adoption of the report and findings of the Board with respect to the question of the allowance of a "*voir dire*" of the hearing committee, the Court has unwittingly adopted and accepted the finding of the Board that "there is no general right to a "*voir dire*" of hearing committee-members- who serve this Board and the Court of Appeals ---". *Decision herein, dated January 11, 1984, page 38.*

This ruling runs contrary to the Rules adopted by the Court to foster an element of due process with respect to procedures before a hearing committee.

The Board rules on Disciplinary Proceedings, Chapter 8, Section 3 (1) C, provides as following:

"The Chairman shall them identify himself and the other member of the Committee and inquire if there are challenges to any member of the Committee". Chapter 18, Section 3 (1)d, provides as following:

"Should challenges result in the departure of the Chairman---"

Implicit within these Rules is the requirements that information may be gained from the panel members which would serve as a basis for the exercise of challenges.

The right of challenge has its source in the common law, and has always been an essential ingredient of a jury trial

and has been codified in the D.C. Code at 13-701 and 23-107. The District of Columbia Court of Appeals, no doubt had in mind, when it promulgated the rule which allows for a challenge, to insure that an accused respondent would have a fair and impartial hearing that is mandated by case law in matters of this type. See *In Re Thorup*, 432 A 2d 1221 (D.C. 1981, citing *Charlton* v. *Federal Trade Commission*, 177 U.S. App. D.C. 418, 543 F2d 903, (1976). It has been held the ultimate function of *voir dire* is to explore the nuiances of conscious to determine whether a prospective person is able to participate fairly in the deliberations on the issues, confining his judgment, to the facts presented, *Crawford v. Bounds*, (CA 4 NC 395 F 2d 297).

The Court obviously does not want to curtail this right and therefore the full Court should make a determination concerning the meaning and implication of the Disciplinary Rule, Chapter 8, Section 3 (1)c, so as to afford an optimum of due process.

(E). THE FINDINGS OF THE COURT SANCTION THE RULE THAT THE BOARD HAS UNLIMITED AUTHORITY IN MATTERS OF VIOLATION OF THE DISCIPLINARY RULES EVEN WHERE THE COURT (SUPERIOR COURT) HAS BEEN REQUESTED TO CONSIDER THE MATTER.

By Order dated, March 11, 1981, the Superior Court ratified the Auditor-Master's Report dated February 12, 1981. The Auditor-Master's Report contained a recommendation that the Court consider the advisability of referring the matter to the Office of Bar Counsel for appropriate action.

In ratifying the Auditor-Master's Report, the Court did not refer the matter to Bar Counsel and made no reference to the Auditor-Masters' recommendation of deferral.

The Board found that:

"In our view, neither we nor the Board on Professional Responsibility is precluded from reviewing respondent's conduct because the court did not specifically refer the matter to the Office of Bar Counsel. The court, in ratifying the Auditor-Master's Report, did not purport to make a determination whether respondent breached his fiduciary duty as trustee. The court's order is silent with regard to whether respondent's conduct warranted a referral to the Office of Bar Counsel, and no inference properly can or should be drawn from that silence. Thus, the court's action in this regard does not preclude this Committee from determining whether respondent's conduct was in violation of the Code of Professional Responsibility. Nor does the court's action constitute a determination that respondent breached his duties as trustee."

The Superior Court of the District of Columbia has general equity powers in matters pertaining to Trustees. *D.C. Code Section 11-921, 1973 Edition*, as Amended. These powers apply to the appointment of Trustees, control of Trustees, their removal, discharge of Trustees and the settlement of their accounts. Therefore, the Court has supervisory control over any matter which concerns the trust, its Administration, its preservations and its disposition and any other matter wherein Trustees are affected in the discharge of their duties toward the trust. When the Court has exercised its supervisory powers and ordered a Trustee discharged as in the instant case, without referring the matter to the Board as recommended, the Court has passed upon the performance of the Trustee toward the trust and the Board may not second guess the Court without subverting the Court's authority.

That the Court did not purport to make a determination of whether the Respondent breached his duty is untenable.

Also is the contention that no inference may be drawn from the silence of the Court on the matter of the referral in its Order of Ratification of the Auditor-Master's Report. To adopt the aforesaid contentions is paramount to charging the Court either with negligence or misfeasance. In fact, the court having before it the request to consider referral, giving due interpretation to the appointing Order and its requirement that the Respondent pay the funds into the Registry of the Court, saw that the duties and responsibilities of the Respondent had been fulfilled. Submission of the report to Auditor-Master for auditing purpose was surplusage.

The presumption prevails that the Court did its duty. In fact, the Board impugned the integrity and sagacity of the Court. For this Court to affirm the findings of the Board concerning the non referral, undercuts the authority of the Superior Court and the Court should review *en banc* to correct this finding which has far reaching consequences.

(F). THE FINDINGS OF THE BOARD ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE OF RECORD AND SHOULD NOT BE ADOPTED.

In Bar Docket No. 224-79, Appeal No. 83-492, Bar Counsel did not show by clear and convincing evidence that misappropriation had occurred. Despite the introduction of some checks from the trust account with payees names who appeared to be indecipherable.

In substantiation of this conclusion the Veteran's Representative testified that he saw or could find no evidence of wrong doing.

Mr. Fallon stated that the duties of the Trustee were to pay off the liens, take out the expenses of the foreclosure, and distribute the surplus to the mortgage holder and that was all that was required. Further that Veterans Administration was paid and Mrs. Pailin was paid; the Respondent was

having difficulty finding Mr. Pailin and that he did not handle the portion of the case relating to advising the Respondent of the address for Mr. Pailin. (Mr. Pailin was in fact paid by the Respondent on December 15, 1982, upon learning of the address of Mr. Pailin).

The Court in its publishing of the lenghty findings of the Board with respect to the two (2) cases adopted without comment those findings. Although clearly the Court as the Reviewing Authority may exercise this role, in a matter of disbarment the rudiment of due process and equal protection of the law under the Constitution, where a livelihood is being deprived, requires more than a mere adoption of findings and this is particularly true where the rule of character witnesses's testimony has been restated and diminished and attributed no weight in proceedings of this type.

This Court should therefore in affording due process and equal protection before imposing the deprivation of disbarment, should review *en banc* the totality of this matter.

WHEREFORE the Respondent respectfully request that he be granted a hearing *en banc* and the mandate stayed pending such hearing.

Respectfully submitted,

/s/Charles A. Brady
Charles A. Brady #141176
Attorney for Respondent
1343 Pennsylvania Avenue, S.E.
Washington, D. C. 20003
332-7600

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Hearing En Banc was mailed, postage prepaid, this 24th day of January, 1984, to Samuel McClendon, Assistant Bar Counsel, 515 5th Street, N.W., Washington, D. C. 20001

/s/Charles A. Brady
Charles A. Brady

DISTRICT OF COLUMBIA COURT OF APPEALS

IN THE MATTER OF

MELVIN M. BURTON, JR. NOS: M 143-82
M 83-192

A MEMBER OF THE BAR OF THE
DISTRICT OF COLUMBIA COURT OF APPEALS

RESPONDENT'S REPLY TO PETITIONER'S OPPOSITION TO PETITION FOR RE-HEARING EN BANC

Charles A. Brady
Counsel for Respondent
Bar Number #141176
1343 Pennsylvania Avenue, S.E.
Washington, D. C. 20003
332-7600

ISSUE I

THE APPLICABILITY OF DISCIPLINARY RULE 102(A) PRESENTLY RE-NUMBERED AS 9-103(A) HAS A RETROACTIVE EFFECT UPON THE INSTANT CASE AND IS THEREFORE VIOLATIVE OF DUE PROCESS.

Prior to April 30, 1983 Disciplinary Rule 102(A) was applicable to acts of commingling as manifested in the lesser sanction meted out in *In Re Dwyer*, M 61-80, *In Re Artis*, M 103-81, *In Re White*, M 52-80, and *In Re Burka*, 423 A 2d 181, 183, 186-197 (D.C. App. 1980) *En Banc*, notwithstanding, which also included 1-102(A)(4) which details and embraces features of dishonesty, fraud, deceit and misrepresentation.

The Court of Appeals announced in June 1983, in *In Re Harrison*, 461 A 2d 1034 (D.C. 1983) the definition of Misappropriation to be applied in this Jurisdiction. Moreover, up until this time, there was no clear cut definition of misappropriation for the District of Columbia as corroborated by an article by Bar Counsel which appeared in the "*Legal Times*" dated February 6, 1984, a copy of which is attached, as Exhibit "A", wherein Bar Counsel stated that it asked the Court of Appeals to announce that in the future, misuse of client's funds will result in disbarment.

The opinion of the Court of Appeals in *Harrison* established the law but the announcement of the rule by Bar Counsel in his article in the "*Legal Times*" was the first notice to the public (lawyers) that the rule was in effect and the notice requirement was necessary before Bar Counsel could safely proceed under the new rule or Court's opinion. Respondent's conduct was *Pre-Harrison* conduct, and therefore, it was a violation of the due process

right of the Respondent to retroactively apply the *Harrison* Rule to *Pre-Harrison* conduct and to have done so, presents the present dilemma with the applicability of sanctions. with the applicability of sanctions.

The imposition of the Harrison standard to *Pre-Harrison* conduct where Bar Counsel after the Hearing for the first time in his Post-Hearing Brief stated his reliance upon the Charge of Misappropriation, after leading the Respondent and the Hearing Committee to rely upon the Charge of Commingling was a violation of the Respondent's Due Process Rights.

The Respondent was not prior to the Hearing giving notice of the reliance upon the Charge of Misappropriation, never charged with that violation and had no opportunity to defend against such a charge. Clearly the Rudiments of Due Process requires reversal.

ISSUE II

THE DISCIPLINE IMPOSED UPON THE RESPONDENT BECLOUDS THE IMPLEMENTATION OF SANCTIONS AND WIDENS THEIR DISPARITY IS AND THEREFORE VIOLATIVE OF DUE PROCESS.

An equitable judicial maxim in meting out sanctions seems to be that Disciplinary Rule are never to be applied in the "abstract" since they have an impact upon the individual Respondent's reputation, character and livelihood, and impinges upon him and his fellow lawyers as practitioners in the profession.

Bar Counsel relied upon, *In Re Dwyer*, M 61-80, *In Re Brown*, M 57-80, *In Re White*, M 52-80 and *In Re Arits*, M 103-81, as precedent cases, and for added leverage used

Burka and Quimby and assert that the Respondent's case is a "mirror image" of the latter two. While image is a rather graphic and ingenious phrase to describe the relationship between the Quimby and Burka cases, it fails to delineate the features of the Respondent and therefore, the "mirror image" analogy is thus faulty.

In reviewing the cases below there appears to be no precedential thread of commonality and the decisions of the Court in the instant cases further serves to demonstrate that DR 9-102(A) has been considered a commingling violation.

The Respondent	**The Violation**	**The Sanction**
In Re Artis, M 103-81	*Rule 9-102(A)*) Rule 9-102(b)) Commingling)	)Public Censure
In Re White, M 52-80	7 Violations:) DR 7-101(f)(2)) and 3 and DR) 1-102(A)(4)) and (5)	Public Censure
In Re Dwyer, M 61-80	DR 6-101(A)(3)	)Nine Months
In Two Counts:	DR 6-101(A)(2)	)Suspension and
	DR 7-101(A)(1)	)with
	(2) and (3)	)Restitution
	DR 1-102(A)(2))	
	dishonesty, fraud,	
	etc.)	
	DR 101-(A) and)	
	(3) .)	
	DR 1-102(A)(5))	
	DR 9-102(B)(1))	

and (3)	)
DR 9-102(A)	)
DR 9-102(A)	)
DR 1-102(A) 4	)

In Re Brown, M 57-80	1-102(A)(3) 1-102(A)(4) 1-102(A)(5)	Consent to Disbarment

In *In Re White, In Re Brown* and *In Re Dwyer,* violations of Disciplinary Rules 9-102(A) and 9-103(A), and 1-102(A)(4) were found by the Board and affirmed by the Court but this notwithstanding, only the Respondent Brown was disbarred and his was a "consent disbarment".

Review of the cases cited above makes it manifestly obvious that the sanction are disportionately meted out and that DR 9-102(A) has prior to its re-numbering been considered to be a Commingling Charge.

As for Quimby and Burka, which cases are relied upon by Bar Counsel as "mirror images". Burka is taken directly from the 423 Atlantic Reporter at page 182 and the profactory paragraph succinctly shows the following:

> "On January 30, 1979, the District of Columbia Bar (petitioner) instituted formal disciplinary proceedings against respondent based upon a referral by Superior Court Judge Margaret A. Haywood. Respondent was changed with violating six disciplinary rules in the Code of Professional Responsibility; (1) DR 9-102(A) failure to deposit funds of client in separate account; (2) DR 9-102(B)(2) Failure to place securities in a safeplace "as soon as practicable", (3) DR 9-102(B)(3) Failure to maintain complete records of all funds" of a client coming into his possession; (4) DR 9-102(B)(4) Failure to deliver promptly to his client

> (the estate) property owned by the ward; (5) DR 1-102(A)(4) dishonesty, fraud, deceit, or misrepresentation; and (6) DR 1-102(A)(5) conduct prejudical to the administration justice."

In *Re Burton*, the instant case lacks ingredients (2) DR 9-102(B)(2)(3), DR 9-102(B)(4) DR 9-102(B)(4) and (6) DR 1102(A)(5) of the Burka case and therefore is to be factually distinguished.

The instant case has other salient features that is, all parties represented by him were timely paid incuding Mr. Pailin whose whereabouts was unknown and he was paid immediately after Respondent received a good address; that no party litigant was harmed as was attested to by the Board's witness in chief, the attorney from the Veteran's Administration and that no demand to deposit funds into the appropriate accounts were ever made.

Burka's conduct was willful, deliberate and calculating. The facts in the Respondent's case lacks these features.

In Re Quimby, the second supportive case relied upon by Bar Counsel is also remarkably different from the instant case.

The summary of this case is lifted verbatim from the head notes from Volume 359, p. 273 (1966) of the U.S. Court of Appeal.

> "Disciplinary proceedings, United States District of Columbia Court for the District of Columbia, Holtzoff, McGarraghy, and Robinson, J.J. disbarred the attorney. The Court of Appeals held that when a member of the Bar is found to have betrayed his high trust by embezzling funds entrusted to him disbarment should ordinarily follow as matter of course, and only the most strigent of extenuating circumstances would justify lesser disciplinary action, such as suspension. Affirmed."

The salient distinguishing fact in Quimby, is that the Respondent was charged with and found to have embezzled his client's funds...in Burton, this obviously is not this case...so the "mirror image" analogy falls.

Disproportionality of sanction is again thrust upon the Respondent in violation of his due process rights, especially is this true when viewed in the light of the sanctions imposed on *Harrison*, Supra, *In Re Cefarratti*, No. M 140-82, June 28, 1983 and *In Re Hines*, Docket Nos. 194-80-447-79, (BPR October 28, 1982).

ISSUE III

THIS CASE WAS LITIGATED AND ADJUDICATED IN A PRIOR PROCEEDING AND ESTOPPED IS APPLICABLE

The Respondent, in the Anderson case was cross-examined extensively on the Pailin Matter, which case was yet to be presented by Bar Counsel, although Bar Counsel had complete and total knowledge of the circumstances of that matter.

The following portions of the Transcript of the cross-examination by Bar Counsel amply demonstrates this fact.

Q. And you wrote the check to a former client, Mrs. Pailin?

A. Well, Mrs. Pailin was not a client of mine.

Q. Oh, I understand, I withdraw that question?

A. But, I wrote it as a result of a transaction that evolved.

Q. You owed her the money?

A. Yes sir.

Q. You owed her $3,300.00 and maybe some more money at the time that you wrote her this check inadvertently, is that correct?

A. Yes.

Q. And you wrote that check on the 14th day of November, is that correct?

A. Yes.

Q. You testified that when you wrote the check to her inadvertently, that you really didn't know that you didn't have enough funds in the other account?

A. No, sir, I didn't say I didn't know. I said at the time I didn't know whether I did or did not, I just didn't know. All I could fathom on at that time was writing the check. Mentally, you know, you've gone through things in a Court recess, you're thinking, and all I can remember is trying to...I know I put in 5,000 in that account in a 15-day period or so, I knew it was 4,000 or 5,000 and I just thought that it might have been there.

Q. Did you owe Mr. Nathaniel Pailin as a result of your transaction?

A. Yes.

Q. Had you paid him at the time you had wrote this check to Mrs. Pailin?

A. I have not paid Mr. Nathaniel Pailin because I don't know where Mr. Nathaniel Pailin is.

Q. Did you...

A. Yes, I wrote Mr. Nathaniel Pailin a letter.

CHAIRMAN MILLER: Just a second, let Mr. McClendon ask the question before you answer.

Q This is your Exhibit #2, would you read the last paragraph?

Q. First of all, would you give the Committee the date of this letter?

A. The date of the letter is September 17th, 1979, and it says, "Finally, I understand that the delay in the distribution of the balance of the foreclosure proceeds are occasioned by the inability to locate Mrs. Pailin's husband. I've taken the liberty of contacting the Department of the Army, Retired Personnel Locator, about Mr. Pailin. That office carries his address as follows: S.F.C. Nathaniel Pailin, Retired, 809 West 232nd Street, Apartment 2B, Torrance, California 90502. Please do not hesitate to call me if any further questions arise in this matter."

Q. Did you make any efforts to contact Mr. Pailin?

A. Yes, sir. On two occasions I wrote letters; only one of which came back. In the meantime, I also picked up the telephone one day in an effort to try to get a number for him at that address; was unable to do so.

Q. You received this document, apparently from the Department of Army; did you ever contact the Department of Army to see whether or not they had a more recent address for Mr. Pailin?

A. No, this from the Office of the United States Attorney.

Therefore the matter cited above shows ample precedent for aplication of the doctrine of Estopped.

ISSUE IV

THE RESPONDENT HAD A RIGHT TO CONDUCT A VIOR DIRE OF THE HEARING PANEL

This Court does not wish as Bar Counsel contends to foster a rule that "there is no general light to a "*voir dire*" of hearing committee members--."

The adoption of such a rule would make Disciplinary Rule, Chapter 8, Section 3(1)c Surplusage and unmeaningful. Clearly, this was not the intent of the Court when it adopted the Rule.

If Disciplinary proceedings are quasi-criminal in nature surely none of the Constitutional safeguards should be relaxed or abridged.

The process of a disciplinary hearing is one where a Respondent is judged by his peers and therefore, in order to insure that the panel shall impartially and objectively assess the evidence presented against a Respondent consonant with the guidelines of the Sixth Amendment to the Constitution, *vorr dire* of the panel members must be allowed.

At the very outset, the Respondent's counsel inquired of the panel whether any of them received VA benefits or VA checks. This question was never answered and the proceedings involved a Veterans Administration Matter. An affirmative answer to this question may well have been sufficient to substantiate a challenge for cause.

Obviously, the Court does not wish to curtail this right and therefore the full Court should make a determination concernig the reason, meaning and the implication of Disciplinary Rule, Chapter 8, Section 3(1)c, so as to afford an optimum of due process to Respondents at the Bar.

ISSUE V

THE BOARD OF PROFESSIONAL RESPONSIBILITY HAD NO JURISDICTION OVER THE MATTER SET FORTH HEREIN

Pursuant to Section 4(3)(a), of Rule XI of the District of Columbia Court of Appeals for the Bar grants virtually untrammelled jurisdiction over its members once a member's conduct falls within its purview.

Exceptions to this untrammelled power, however, are that the Board may not act when to do so would violate public policy or when it has been ordered not to do so by a Court Order.

While the action of the Superior Court herein by its refusal to refer the matter to the Board, was not an order for the Board not to take jurisdiction, the effect of non-referral by the Court when asked to *consider* referral, by the Auditor Mastor was tantamont to the Court saying that no conduct of the Respondent warranted consideration by the Board on Professional Responsibility and accordingly, the Board should not have exercised jurisdiction, once the unsworn initiating complaint proved groundless.

The only interpretation that may be given to the action of the Court when it made no referral is that it performed its duty and the Board could not, without requesting the Court to reconsider, proceed against the Respondent, without subverting the authority of the Superior Court.

This Court should not establish a precedent which allows the Board to act without limitations.

ISSUE VI

THE BOARD'S FINDING WITH REGARD TO THE PAILIN MATTER WAS NOT SUBSTANTIATED BY ORAL NOR DOCUMENTARY EVIDENCE

Bar Counsel would have the Court makes a finding diametrically opposite the testimony of its witness, the Veteran's Administration Attorney, whose Agency made the initial complaint, who concluded his testimony thusly.

> "Again, I don't see where that would be of a particular concern to the Veterans Administration, other than ultimately to know about it, because we feel that we have an obligation to know the terms of the Deed of Trust in which we are the holder and have appointed a substitute trustee have been carried out, but we would not expect Mr. Burton to tell us his daily activities in connection with the property that did not belong to us anymore"

It is apparent that the Hearing Committee was persuaded by this testimony because it concluded:

> "1. That the case relied upon by Bar Counsel, In the *Matter of Quimby*, III, 359 F 2d (D.C. Cir. 1966) went far beyond the bare bones financial records of the accused and that this matter the evidence against the Respondent is limited to the bank records of a particular trust account with no testimony.
>
> 2. That there was no other evidence showing the ultimate use or purpose of the withdrawals from the trust account causing it to be less than the amount due to the Veterans Administration and the Pailins.

3. The individuals who received checks drawn on the bank account were not called as witnesses.

4. No testimony is in the record to show to what extent the funds were used for the Respondent's personal use.

5. There was no testimony or other evidence in the form of an analysis of the Respondent's client's accounts on which to evaluate the extent of Respondent's misuse of clients' funds and

6. The evidence herein consist primarily of the bare bone bank account records, which standing alone, do not permit an informed judgment.

It is clear that to conclude from these statements that the Respondent violated the Disciplinary Rules is to foster upon the public the notion that the board and the Court are not bound by its own witnesses who disclaim that a violation took place. Such a finding would undermine the public's faith in the Bar process.

CONCLUSION

For all the foregoing reasons it appears that there are matters of law which the Court should re-examine so as to provide due process to the Respondent and therefore, it is respectfully requested that the Court grant the Respondent a ReHearing *En Banc*

Respectfully submitted,

/s/Charles A. Brady
Charles A. Brady
Attorney for Respondent
1343 Pennsylvania Avenue, S.E.
Washington, D. C. 20003
332-7600

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition was mailed postage prepaid to Samuel McClendon, Assistant Bar Counsel, 515 5th Street, N.W., Washington, D. C. 20001, this 4th day of March, 1984.

/s/Charles A. Brady
Charles A. Brady

Misuse of Client Funds May Lead to Disbarment

Continued from page A4

posed. The court rejected that argument, saying:

> The administration of justice under the adversary system rests on the premise that clients and the Courts must by able to rely without question on the integrity of attorneys. An act against a client evidencing moral turpitude, even though attributable to some aberration or stress that would warrant the prosecutor in abstaining from criminal prosecution, may nevertheless warrant severe disciplinary action concerning an officer of the Court.

> When a member of the Bar is found to have betrayed his high trust by embezzling funds entrusted to him, disbarment should ordinarily follow as a matter of course. Such misconduct demonstrates absence of the basic qualities for membership in an honorable profession. Only the most stringent of countervailing circumstances would justify a lesser disciplinary action, such as suspension, which implies a likelihood that at some future time the Court may again be willing to hold out the applicant as an officer of the Court worthy of clients' trust. The appearance of a lesser attitude toward known embezzlers would give the public a false impression of the Court's standards.

The board recommended that Harrison be suspended for a year and a day, but asked the court to stipulate that in the future, any conversion of trust funds would result in disbarment. Based upon the facts reported by the board, the court agreed that Harrison had misappropriated client funds. In doing so, the court noted that an improper intent is not an element of misappropriation and that misappropriation does not require scienter. The court adopted the New Jersey Supreme

Photo by John Woo

Henderson: Plans rigorous prosecution in misappropriation cases

serious forms of professional misconduct. Late last year, for the first time the D.C. appeals court temporarily suspended two attorneys for allegedly misusing client funds. In *In re Melvin*,[1] the board filed a petition for immediate temporary suspension with the court that alleged that Melvin converted client funds and failed to render the legal services for which he had been retained. The board also asked that respondent be precluded from withdrawing funds from any of his bank accounts without prior permission and that he be required to submit to an audit of his records.

Upon receiving the board's petition, the court issued an order directing Mel-

Cummings was engaged in a pattern of misusing trust funds and obstructing a pending disciplinary investigation. The board requested that the attorney's access to his bank accounts be limited and that he be ordered to undergo an audit. As in *Melvin*, the court temporarily suspended Cummings pending the disposition of all disciplinary charges against him or until further order of the court.

In its opinion in *Melvin*, the Court analogized the temporary suspension of an attorney to a preliminary injunction and adopted the standards applicable to the issuance of an injunction to the framework of an attorney disciplinary proceeding. The court stated that the following factors should be weighed in evaluating a petition for temporary suspension:

> 1. Whether the attorney is causing irreparable public harm by misappropriating client funds to his own use, or by other means;
> 2. Whether there is a substantial likelihood . . . that a significant sanction will be imposed on the attorney at the conclusion of any pending disciplinary proceedings . . . ;
> 3. Whether the balance of entries as between attorney and clients favors a temporary suspension, and whether the public interest would be served by a temporary suspension.'

Notwithstanding the lesser sanction imposed in *Harrison*, the courts have made it consistently clear that stealing client funds will be dealt with severely. The Office of Bar Counsel intends to

In misappropriation cases, disbarment is not automatic. The court will address fiduciary breaches on a case-by-case basis.

lic prove cause for concern and undermine the public confidence in the integrity of the profession and of the legal system whose functioning depends upon lawyers.

For several years after the court reorganization, there was little opportunity for the D.C. Circuit to reconsider the approach taken in *Quimby*. In 1980, however, the court reviewed a recommendation of the Board on Professional Responsibility that an attorney be disbarred for his mishandling of trust funds. *In the Matter of Burka*[1] involved a respondent-attorney who had been found to have made unauthorized withdrawals totaling $41,000 from an estate under his control. When the matter came to light, Burka promptly made restitution to the estate. Despite Burka's long membership in the Bar and the absence of any prior discipline, the court accepted the board's recommendation for disbarment.

Rejects Per Se Standard

Following *Burka*, it was unclear whether the court had adopted a per se disbarment standard for the misappropriation of client funds. In 1983, however, the court of appeals tacitly rejected such an approach in *Harrison*. In this case, the respondent-attorney had placed a client's funds in his own account and had spent the funds for his own purposes.[2] Harrison failed to promptly repay his client and [illegible] this evidence that was discovered by the [illegible] from *In re Wilson*, which interpreted the term to mean "any unauthorized use by a lawyer of client funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purposes, whether or not he derives any personal gain."

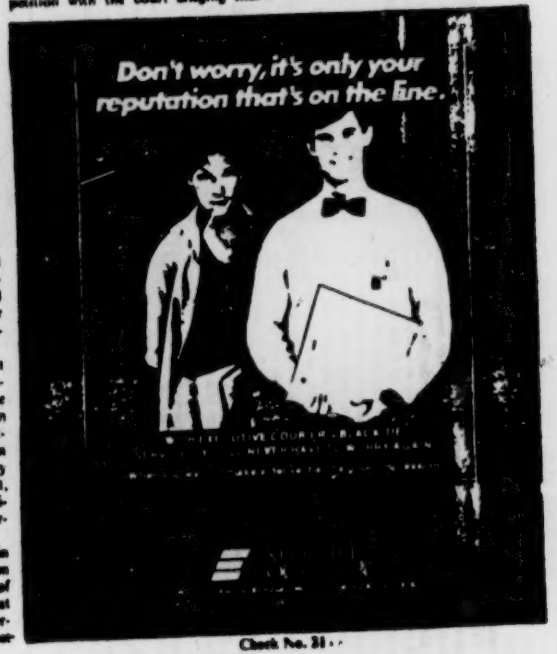
Thus, when the running balance in Harrison's trust account fell below the amount he owed his client, misappropriation had occurred, even though his conduct was not intentional, and could be attributed to sloppy bookkeeping. Although the court accepted the Wilson definition of misappropriation, it did not promulgate an automatic disbarment standard. Rather, the court adopted an ad hoc approach to misappropriation cases. In this context, the court determined that although Harrison's inadvertence was no defense to a charge of misappropriation, it did justify a lesser sanction than disbarment. The court approved the board's recommendation that Harrison be suspended for a year and a day. The court distinguished *Harrison* from *Burka* and *Quimby* by noting that those earlier cases involved the conscious withdrawal of client funds.

In view of *Harrison*, it is clear that disbarment is not automatic in cases involving misappropriation. Instead, the court will address fiduciary breaches on a case-by-case basis. This analysis recognizes that irregularities in the way an attorney handles client funds often may be simply the result of mismanagement, rather than an intentional misuse of client funds, and therefore does not warrant disbarment.

Although the discipline imposed in *Harrison* represents a change from *Burka* and *Quimby*, the D.C. Court of Appeals made it clear in *Harrison* that misappropriation—even when inadvertent—is still considered one of the most [illegible] suspended temporarily. Thereafter, the court temporarily suspended Malvin pending the disposition of all disciplinary charges or until further order of the court. Moreover, the court prohibited Malvin from further access to trust funds without the specific approval of the board.

In *In re Cummings*,[5] the board filed a petition with the court alleging that [illegible] misappropriation and to recommend the sanction of disbarment except in extraordinary circumstances. The integrity of the profession demands no less

[1] 451 A.2d 1034 (D.C. 1983).
[2] 350 F.2d 257 (D.C. Cir. 1966).
[3] 423 A.2d 81 (D.C. 1980).
[4] 81 N.J. 451, 409 A.2d 1153, 1155 n. 1 (1979).
[5] No. 83-157 (D.C. Bar. 12, 1983).
[6] 83-605 (D.C. Bar. 14, 1983).
[7] Malvin, supra, slip op. at 6.



Check No. 31

...over the U.S. ct. ...n bar's fee informa- ...ntention that led to a ...nembers: How far a ...be pursued, they ...f practical and pro- ...ional?

...grew out of govern- ...forts, beginning in ...o secure records of ...he VII suits handled ...epening in the bar's ...information service ...to government law- ...now that fee awards ...serious LRIS attor- ...et al. v. Hodel, a suit ..., are inflated for ...are the actual "mar- ...by LRIS attorneys in ...on. The government ...s the information ...to help courts, Con- ...strative agencies de- ...ter fee awards should ...f its efforts to hold ...eaders the unreason- ...ments.

...stubbornly resisted a ...ions for the files, ulti- ...ed is now fighting a ...to remove the files ...of a protective order. ...ney, David K. Perdue ...e of Chimgo's Kirk- ...the government effort ...son," claiming the in- ...Circuit.

A climactic moment in the standoff ...curred on Nov. 29 when board members, in an emergency meeting, voted by ...most play of demanding individual sanctions, according to D.C. Bar President David Isbell of D.C.'s Covington & Burling. This "astonishing" and ...in which directors of corporations ha... been held individually in contempt w...

Continued on page A5

Stealing Client Funds Is Deadliest of Sins

By Thomas H. Henderson Jr.

Mr. Henderson is bar counsel of the District of Columbia Bar.

The District of Columbia Bar's Office of Bar Counsel receives about 900 complaints a year from the public about attorneys who belong to the District of Columbia Bar. Many of the allegations are frivolous and are dismissed quickly. Some involve minor violations of the Code of Professional Responsibility and are resolved by a lesser sanction such as an informal admonition or reprimand. Among the other complaints received are charges that attorneys have misappropriated or stolen their clients' funds. This is one of the most serious violations of the code and historically has resulted in the ultimate legal sanction—disbarment.

Basically, Disciplinary Rule DR 9-103(a) of the Code requires an attorney to keep his client's funds in a separate, identifiable bank account, and with certain exceptions, to refrain from withdrawing the client's funds from the account unless authorized. If the account drops below

bar business

that amount owed to the client, misappropriation occurs.

The D.C. Court of Appeals recently decided *In the Matter of Harrison*,[1] a case in which it found that an attorney had misappropriated client funds, but instead of disbarring the attorney, the court suspended him for a year and a day. Since this case marks the first time in the history of the court that an attorney was not disbarred for misappropriating client funds, a commentary on that case and its effect on the law of misappropriation as developed in the District of Columbia is in order.

In 1966, prior to the court reorganization in the District of Columbia in 1972, the U.S. Court of Appeals approved the disbarment of a lawyer for misappropriating funds. This individual had been a practicing attorney for almost 40 years without any prior record of misconduct. In *In the Matter of Quimby III*,[2] Quimby had withdrawn $18,000 from the estates of two incompetent war veterans for his own use. He returned all the funds with interest, and testified that he was under extreme mental pressure at the time.

Emphasizes Unblemished Record

In mitigation of his misconduct Quimby emphasized his previous unblemished record and contended that the misappropriation was an aberration that was unlikely to be re...

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APPENDIX

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

FIFTH AMENDMENT

No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

No: 83-1836 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MELVIN M. BURTON, JR.
A Member of the Bar of the
District of Columbia Court of Appeals

Petitioner,

v.

BOARD ON PROFESSIONAL RESPONSIBILITY OF THE
DISTRICT OF COLUMBIA COURT OF APPEALS

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE BOARD ON PROFESSIONAL RESPONSIBILITY IN OPPOSITION

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* *Counsel of Record*

Counsel for Respondent

November 12, 1984

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QUESTIONS PRESENTED

1. Whether petitioner received notice under the due process clause of the Fifth Amendment to the Constitution of the United States that he was being charged with misappropriation under Disciplinary Rule 9-102(A).

2. Whether the sanction of disbarment imposed in cases involving knowing commingling and misappropriation of client funds is consistent with precedent in the District of Columbia.

3. Whether the Board on Professional Responsibility is estopped from instituting disciplinary proceedings against petitioner on facts elicited on cross-examination in another disciplinary proceeding.

4. Whether due process is violated when petitioner is denied the opportunity to conduct a *voir dire* of Hearing Committee members in disciplinary proceedings.

5. Whether the authority of the Board on Professional Responsibility to institute disciplinary proceedings against a member of the District of Columbia Bar presents a federal question which warrants this Court's review.

6. Whether the substantial evidence standard used by the Board on Professional Responsibility and the District of Columbia Court of Appeals in reviewing disciplinary proceedings violates due process.

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BRIEF FOR THE BOARD ON PROFESSIONAL RESPONSIBILITY IN OPPOSITION

OPINION BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. A 1-A-73) is reported at 472 A.2d 831 (D.C. 1984)

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on January 11, 1984. A petition for rehearing *en banc* was denied on April 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATEMENT

Petitioner was ordered disbarred from the practice of law by the District of Columbia Court of Appeals for violations of disciplinary rules set forth in the District of Columbia's Code of Professional Responsibility. The violations arose in two separate proceedings. In a complaint brought by Gladys Anderson (hereinafter the *Anderson* matter), a Hearing Committee of the Board on Professional Responsibility of the District of Columbia Court of Appeals found that petitioner commingled and misappropriated funds in his capacity as a court-appointed trustee in violation of Disciplinary Rule 9-102(A)[1] and that he engaged in dishonest conduct in violation of Disciplinary Rule 1-102(A)(4). The Hearing Committee's recommendation that petitioner be disbarred was adopted by the Board on Professional Responsibility (Board).

Petitioner was also found to have commingled and misappropriated client funds in violation of Disciplinary Rule 9-102(A) and Disciplinary Rule 1-102(A)(4) in a complaint brought by Mrs. Loretta Pailin (hereinafter the *Pailin* matter). The Hearing Committee recommended that petitioner be suspended from the practice of law for four years. That sanction was rejected by the Board which recommended that petitioner be disbarred.

Both the *Anderson* and *Pailin* matters were consolidated for purposes of appeal. The District of Columbia Court of Appeals adopted the recommendations of the Board in both cases and ordered that petitioner be disbarred from the practice of law. *In re Burton*, 472 A.2d 831 (D.C. 1984).

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1. DR 9-102 was renumbered DR 9-103 on April 30, 1982, when the District of Columbia Court of Appeals amended the Code of Professional Responsibility with the "revolving door" rules, now DR 9-102. ("*REVOLVING DOOR*"), 445 A.2d 615, 618 (D.C. 1982) (*en banc*). For purposes of consistency with the petition, Hearing Committee Report and Board Report, we refer to what is now DR 9-103 as DR 9-102 in this brief.

A. The Anderson Matter

The evidence, as reflected in the opinion of the District of Columbia Court of Appeals showed that petitioner was appointed by the Superior Court of the District of Columbia on February 9, 1979, as trustee to sell real property on behalf of Gladys Anderson. The land was sold on April 9, 1979, for $18,000 less encumbrances, liens, costs and appropriate adjustments.

On April 30, 1979, petitioner opened a trust account into which he deposited an initial payment of $12,777.83. Petitioner later deposited additional proceeds from the sale which brought the net amount received from the sale to $13,407.42. The evidence showed that during the period of November 14, 1979, to January 14, 1981, petitioner made unauthorized withdrawals from the account for his personal and business uses and that he deposited amounts from unidentified sources into the account. These transactions caused the account to have shortages and overages during the above period and resulted in a balance of $191.30 on April 9, 1980, less than 2% of the $10,495.09 for which petitioner was then accountable as trustee.

The Auditor-Master of the Superior Court scheduled a hearing to inquire into the mishandling of the estate funds. At the hearing, petitioner acknowledged his misuse of the trust funds but claimed that he did not endanger its security since he had reserves of cash derived from his law practice to replenish the estate. In support of this claim, petitioner testified under oath that he grossed in excess of $150,000 from his law practice in 1979. However, his business tax return for that year showed that in 1979, petitioner reported a gross income from his business of $58,073. During his disciplinary proceeding, petitioner acknowledged that his testimony to the Auditor-Master was false.

B. The Pailin Matter

The evidence presented to the Hearing Committee showed that petitioner was retained by the Veterans Administration (VA) to institute foreclosure proceeding against Nathaniel and Loretta Pailin when they defaulted on a VA loan secured by a real estate

deed of trust. The property was sold at a foreclosure sale in June, 1978, for $28,000. Petitioner was retained to remit to the VA the amount owed on the outstanding loan (approximately $17,000) and to pay the remainder to the Pailins after deducting his fees and other expenses associated with the sale.

Petitioner received a check for $26,378.16 from the settlement company as the net proceeds of the sale. Thereafter, on July 16, 1978, petitioner deposited the check, less a sum of $1,505.90 (not here in question) into his client trust account. After deducting his fee and paying other costs, petitioner was accountable to the VA for $16,638.68 and to the Pailins for $7,256.10, an aggregate amount of $23,895.78.

On July 18, 1978, petitioner wrote a check on the trust account for $1,000, so that the account's balance fell to $23,744.11, a sum less than the amount payable to the VA and the Pailins. Subsequent checks written on the account, payable neither to the VA nor the Pailins, caused the balance to fall to $19,969.66.

On July 27, 1978, petitioner paid the VA the $16,639.68 which it was owed from the foreclosure sale. That transaction left a balance of $2,929.28, even though, by petitioner's own accounting, he still owed the Pailins $7,256.10. Petitioner continued to misappropriate the trust funds so that by late November, 1978, the account balance dropped to as low as $10.10.

On November 14, 1979, Ms. Pailin was paid her share of the proceeds, in the amount of $3,628.05. This payment was made by petitioner out of funds he was holding as a court-appointed trustee in the *Anderson* matter. Mr. Pailin was never paid his share of the proceeds. (TR. P. 31-32).[2]

ARGUMENT

1. Petitioner contends that at the time he was charged with Disciplinary Rule 9-102(A) in the *Anderson* matter, the rule prohibited only the commingling of client funds and did not apply to misappropriation. Accordingly, petitioner claims that when

2. The transcript of the hearing in the *Pailin* matter is cited as TR. P.

he was found to have commingled and misappropriated funds as a court-appointed trustee in violation of that rule, that he was deprived of his right to notice of the charges against him as required by the due process clause of the Fifth Amendment.

Petitioner's contention is without merit, for the following reasons. First, the petition which set forth the charges in this case clearly placed petitioner on notice that he was being charged with misappropriation as well as commingling under Disciplinary Rule 9-102(A). The petition states in part that petitioner "commingled trust funds . . . and made withdrawals of funds from the trust account for his personal and business uses" and that during this period that petitioner "caused the trust account to have a smaller balance . . . than the amount which was subject to the trust." These allegations clearly included a charge of misappropriation, i.e., using the funds of another without authority to do so.

Second, Disciplinary Rule 9-102(A) unquestionably applied to misappropriation at the time of the violations in *Anderson*. The rule requires that client funds paid to a lawyer "be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated . . ." DR 9-102(A). As the District of Columbia Court of Appeals noted, unauthorized withdrawals are inconsistent with the rule "unless the requirement to deposit is given only a formal meaning." *In re Burton*, 472 A.2d at 838; *In re Quimby*, 359 F.2d 275 (D.C. 1966); *In re Burka*, 433 A.2d 181 (D.C. 1980); *In re Harrison*, 461 A.2d 1034 (D.C. 1983).

In addition, the Court found that a construction of Disciplinary Rule 9-102(A) that includes misappropriation is consistent with the rule's purpose of guarding against the possible loss of client funds. *Id.* Other jurisdictions have similarly concluded that Disciplinary Rule 9-102(A) prohibits both commingling and misappropriation. *See, e.g., In re Wilson*, 81 N.J. 451, 454, 409 A.2d 1153, 1154 (1979) ("Misappropriation of client funds is both a crime . . . and a direct violation of Disciplinary Rule 9-102"); *In re Pattison*, 441 A.2d 328, 329 (Md. 1982).

Thus, the explicit terms of the petition, which alleged a violation of Disciplinary Rule 9-102(A), placed petitioner on notice that he was charged with misappropriation of funds he held as a court-appointed trustee. Petitioner's due process claim must accordingly fail.

2. Petitioner contends that the District of Columbia Court of Appeals retroactively applied a newly adopted definition of and sanction for misappropriation when it ordered his disbarment in *Anderson* and *Pailin*. Petitioner further claims that the sanction of disbarment was overly severe and discriminatorily applied by the District of Columbia Court of Appeals.

Petitioner did not raise this issue in the court of appeals. Inasmuch as this issue was not preserved below, it is not properly before this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.6 (1977).

Even if petitioner's contention were properly before the Court, it is without merit. Contrary to petitioner's claim, his conduct was not judged by a "new" definition of misappropriation. Rather, members of the Bar have been on notice since 1966 that the ordinary sanction for misappropriation is disbarment. *In re Burka*, 433 A.2d 181; *In re Quimby*, 359 F.2d 275.

Decisions of the court of appeals with regard to the proper sanction in misappropriation cases are also not inharmonious, as petitioner claims. While disbarment is the ordinary sanction in cases of intentional misappropriation, the court has imposed less severe sanctions where the misappropriation is inadvertent. For example, in *In re Harrison*, an attorney failed to keep accurate bank records and accordingly allowed the balance in a commingled account to fall below the amount held in trust for his client. The court of appeals found that, even though the attorney had not intended to expend his client's funds for his personal use, misappropriation had occurred and imposed a period of suspension for a year and a day. 461 A.2d at 1035.

Similarly, in *In re Hines*, No. M-141-82 (D.C. Sept. 26, 1984), the District of Columbia Court of Appeals found that misappropriation occurred where an attorney showed a "reckless disregard" of the security of client funds where he failed to keep running account balances and allowed the total balance of his commingled accounts to fall below the amount he was supposedly holding for his clients. The court ordered the attorney suspended for a period of two years. *See also In re Cefaratti*, No. M-140-82 (D.C. June 28, 1983).

Thus, while a lesser sanction might be appropriate where the misappropriation is inadvertent, disbarment is the ordinary sanction in cases of intentional misappropriation. Here the evidence showed that the petitioner knowingly misused trust account funds in the *Anderson* and *Pailin* matters. In *Anderson* petitioner acknowledged that he used the trust funds to pay his office rent, the office rent of his associates, witness fees, refunds of client fees, his secretary's salary, tax bills, his law clerk's salary and other expenses unrelated to the trust. *In re Burton*, 472 A.2d at 837, 839. In *Pailin*, the court of appeals found a knowing misappropriation of trust account funds, that was not due to sloppy bookkeeping, where account records showed that petitioner had written numerous checks which caused the account balance to fall to as low as $10.00 at a time when petitioner still owed the Pailins more than $23,000. *In re Burton*, 472 A.2d at 844. Accordingly, the court of appeals' sanction of disbarment was neither overly harsh nor discriminatory but was imposed in accordance with judicial precedent.

3. Petitioner claims that, in the *Anderson* case, he was cross-examined regarding the same charges raised in the *Pailin* proceeding and that, therefore, Bar Counsel was collaterally estopped from bringing charges in the *Pailin* case. Petitioner's assertion is without merit.

First, although petitioner did raise the collateral estoppel argument before the Hearing Committee, he did not raise it before the Board or in the District of Columbia Court of Appeals. Thus,

even if the collateral estoppel argument had some merit, that issue was not preserved below and it is not properly presented in this Court. *United States* v. *Lovasco*, 431 U.S. at 788 n. 6.

In any event, the issue of collateral estoppel does not warrant further review in this case. The doctrine of collateral estoppel operates to prevent the relitigation and adjudication of a matter which has been already decided by an appropriate forum. *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461 102 S.Ct 1883 (1982). Here the issue of the misappropriation of the Pailin's money was neither litigated nor adjudicated in *Anderson*. The Hearing Committee accordingly concluded that petitioner's collateral estoppel argument failed for lack of proof. In addition, petitioner cannot claim that the introduction of evidence of the *Pailin* matter in the *Anderson* case prejudiced his rights since both cases were consolidated at his request in the District of Columbia Court of Appeals. Therefore, petitioner's collateral estoppel argument is a non-issue.

Moreover, petitioner overlooks the fact that he raised the *Pailin* issue on direct examination in the *Anderson* case. That is, in defending the charge of misappropriation against him in *Anderson*, petitioner contended that his initial breach of the trust account was unintentional. He claimed that on the day he breached the trust, he inadvertently wrote a certified check to Ms. Pailin for $3,300 on the trustee account when he actually intended to write the check on another account. To impeach petitioner, Bar Counsel elicited testimony from him concerning the *Pailin* matter to show that on the day petitioner wrote the certified check to Ms. Pailin for $3,300, he did not have sufficient funds in his client trust account to cover that check. Thus, petitioner "opened the door" with regard to the *Pailin* matter on direct examination. The consequent cross-examination by Bar Counsel was accordingly proper. *See Alford* v. *United States*, 282 U.S. 687, 691 (1931); Fed.R.Evid. 610(b).

4. In the *Pailin* matter, petitioner argues that he was deprived of his rights under the Fifth and Sixth Amendments to conduct a *voir dire* of members of the Hearing Committee that initially

heard his case. This issue was not raised in the court of appeals and is not properly before this Court. *United States* v. *Lovasco*, 431 U.S. at 788 n.6.

In addition, there is no general right to a *voir dire* of Hearing Committee members—who serve in a quasi-judicial capacity—any more than there is a right to *voir dire* a judge before filing a motion for his recusal. Petitioner also does not set forth grounds to show why the failure to conduct a *voir dire* resulted in a deprivation of his right to due process. In fact, when asked by the Hearing Committee what issues he would raise in a *voir dire*, if allowed to conduct one, petitioner was unable to show that he had a factual basis for a challenge to any hearing committee member or for a *voir dire* on any specific area of inquiry. (TR. P. 3-4). Under these circumstances, petitioner wholly failed to establish a due process violation.

5. Petitioner challenges the jurisdiction of the Board on Professional Responsibility to entertain the disciplinary proceeding against him in the *Anderson* matter. He claims that since the superior court, which discharged him as trustee, failed to refer his case to the Board, the Board was without authority to investigate allegations of his misconduct. This issue is not properly before the Court since it does not raise a federal question. *See* 28 U.S.C. § 1257(3). The Board's authority to entertain the disciplinary proceeding against petitioner is purely an issue of local law which was resolved in the Board's favor by the District of Columbia Court of Appeals. *See Financial General Bankshares, Inc.* v. *Metzger*, 220 U.S. App. D.C. 219, 680 F.2d 768 (1982).

6. Petitioner contends that in reviewing a disciplinary proceeding, the due process clause of the Fifth Amendment requires both the Board on Professional Responsibility and the District of Columbia Court of Appeals to utilize a standard greater than the substantial evidence test for review. Petitioner's assertion is without merit.

First, as with several other issues raised by petitioner, this issue was not raised in the District of Columbia Court of Appeals.

Since it was not preserved below, it is not properly before this Court. *United States* v. *Lovasco*, 431 U.S. at 788 n.6.

Second, the standard for judicial review of disciplinary proceedings in the District of Columbia is well-settled. Rule XI, § 7(3) of the Rules Governing the District of Columbia Bar provides in pertinent part: "In considering the appropriate order, the court shall accept the findings of fact made by the Board unless they are unsupported by substantial evidence of record." The same standard is used by the Board when reviewing findings of fact made by a Hearing Committee. The Board on Professional Responsibility of the District of Columbia Court of Appeals Internal Rule 12.6 (1983).

This standard of review is identical to the "substantial evidence" test of the District of Columbia's Administrative Procedure Act, D.C. Code Ann. §1-1510(3)(E) (1973), and to the standard of review used in proceedings to revoke the licenses of physicians. *See Sherman* v. *Commission on Licensure to Practice the Healing Art*, 407 A.2d 595 (D.C. 1979). Nevertheless, petitioner claims that the test violates his right to due process of law.

In *In re Smith*, 403 A.2d 296 (D.C. 1979), a similar challenge to the standard of review in disciplinary proceedings was raised. The court of appeals rejected the contention that the Board on Professional Responsibility should use a "clear and convincing evidence" test, noting that while the Board will normally utilize a "substantial evidence on the record as a whole" standard in reviewing findings of a Hearing Committee, the Board uses a "clear and convincing evidence" test when making its own findings of fact. *Id.* at 302. In view of the protection afforded petitioner of requiring the Board to utilize a "clear and convincing" test when making its own findings, and the fact that the substantial evidence test utilizied by the Board and the District of Columbia Court of Appeals comports with the standard of review in similar license revocation proceedings, petitioner's due process claim must fail.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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